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The statutes of some of the States provide for the summoning and selection of what is known as "special juries" for the trial of particular causes. To practitioners in such States the leading case of this issue—St. Louis, Keokuk & N. W. Ry. Co. v. Withrow, decided by the Supreme Court of Missouri,—will probably be of as much interest as to those in the city of St. Louis, whose special jury system is directly affected. By this decision the Supreme Court of Missouri very properly uphold the right of *nisi prius* judges, under the law, to make reasonable rules for the government of their courts, and declares valid a rule of court governing the selection of special juries in the city of St. Louis, which authorizes the selection of a certain number of "good and lawful men" as special jurors without further designation of qualifications. The court shows very clearly that there is no warrant for the contention made by those who oppose this apparent innovation, that a special jury is and must be a jury of "more than ordinary intelligence." The old method of selecting special juries, framed upon that idea, was clearly unfair to litigants. It is of common knowledge that in cases where corporations were parties the juries were largely composed of officers or friends of corporations. The new method has been adopted after careful consideration by the judges of the court, and it is a matter of congratulation that the supreme court has indorsed its reasonableness and validity.

post- p. 198.

Considerable adverse criticism has been directed towards the decision of Mr. Justice Mayham of New York in denying a motion for a new trial in the case of People v. Shea, convicted of murder and recently executed. This was the case growing out of political strife at the polls of Troy, New York, and about which so much has appeared in the daily press. The motion for new trial was made upon the ground of newly discovered evidence—as disclosed by the affidavit of one McGough, that he, and not Shea, fired the shot that caused the death of Ross. It is a well understood proposition of law that a court has power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, provided it is made to appear by affidavit, that upon another trial, the defendant can produce evidence such as if before received might have changed the verdict; if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence. We understand that Judge Mayham found that the newly discovered evidence had been discovered since the trial and that there was no want of diligence in failing to produce it there but he held that it was cumulative and that if it had been received on the trial it would not probably have changed the verdict. He held that the newly discovered evidence is cumulative because it tends to show that some other person than Shea killed Ross, and several witnesses examined for the defense on the trial testified that the fatal shot was fired by one Boland. The judge who presides at the trial of a case, is of course, better qualified to pass upon a question of this character, at least so far as the facts are concerned, but it will suggest itself to many that by the same method of reasoning as that adopted by Judge Mayham any newly discovered evidence tending to show the innocence of the accused in any case might be called cumulative because the purport of all the evidence offered for the defendant in every trial is to prove that he was not guilty. Conceding that, in a technical sense, the evidence above mentioned may be cumulative, there are well defined exceptions to the general rule which denies a new trial predicated thereon. These are when the evidence goes right to the merits of the case, and where such evidence might change the result. 1 Hayne's New Trial, § 90, p. 256; 7 Crim. Law Magazine, p. 182; Anderson v. State, 45 Conn. 519; Levitzky v. Johnson, 35 Cal. 43. These exceptions are reasonable, and in a criminal case at least, consonant with justice. The view of Judge Mayham on the subject of the probable effect of the newly discovered evidence upon another jury seems equally unsatisfactory in point of law. It does not need to appear, in behalf of a defendant, that the newly discovered evidence would produce a different re-

sult. It is a well settled proposition that in cases where the new evidence is material and it is doubtful how it might affect the jury a new trial should always be granted. As we gather from the report of Judge Mayham's decision he not only applied, in all its strictness, the technical rule as to cumulative evidence, but also solved the doubt, which he admitted existed on the subject of the probable effect of the new evidence, in favor of the State. If this be true it is quite clear that he committed error.

NOTES OF RECENT DECISIONS.

CORPORATIONS—STOCKHOLDERS—ENFORCEMENT OF LAWS OF OTHER STATES—KANSAS STATUTES.—The constitutional provision of Kansas, that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law," has again been held as not self-executory, but requiring legislation as seen by the judgment of the New York Court of Appeals in Marshall v. Sherman, 42 N. E. Rep. 419. It will be remembered that the Supreme Court of Illinois made a like ruling in reference to the Kansas constitution in Fowler v. Lamson, 146 Ill. 472, and in Tuttle v. National Bank, etc., 9 Nat. Corp. Rep. 316, still pending on rehearing.

Discussing the subject-matter of the enforcement of State laws in another State jurisdiction, the court of appeals held that the doctrine has many limitations and qualifications, and generally each sovereignty determines for itself their true scope and extent. While the courts of New York are open to all suitors, there is a large class of foreign laws and statutes, which, under the rule of comity, have no force in that jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without at the same time neglecting the duty which it owes to its own citizens or subjects.

Particularizing upon the subject the court said: "It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women as well as the local statutes of frauds and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. Morgan v. Neville, 74 Pa. St. 52; Waldron v. Ritchings, 3 Daly, 288; Siegel v. Robinson, 56 Pa. St. 19; Kelly v. Davenport, 1 Brown (Pa.), 231; Ross v. Wigg, 34 Hun, 192; Ludlow v. Van Rensselaer, 1 Johns. 95; Skinner v. Tinker, 34 Barb. 333. It is well understood, also, that the statutes of one State, giving a right of action to recover a penalty, have no force in another. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224. So, also, rights of action arising under foreign bankrupt, insolvent or assignment laws, are not recognized here when prejudicial to the interests of our own citizens. Warner v. Jaffray, 96 N. Y. 248; *In re* Waite, 99 N. Y. 433, 2 N. E. Rep. 440; Barth v. Backus, 140 N. Y. 230, 35 N. E. Rep. 425; Douglas v. Insurance Co., 138 N. Y. 209, 33 N. E. Rep. 938. There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here. Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E. Rep. 1050. Statutes giving a right of action for negligence resulting in death belong to that class. Whitford v. Railroad Co., 23 N. Y. 465."

CRIMINAL LAW—TRIAL VERDICT RENDERED IN ABSENCE OF ACCUSED.—The Supreme Court of Michigan held, in Frey v. Calhoun, 64 N. W. Rep. 1047, that a verdict in a trial for felony is not invalid because rendered in the absence of the accused, notwithstanding a statutory provision that no person indicted for a felony shall be tried unless personally present during the trial, where it appeared that the accused was out on bail and the verdict was rendered during court hours. The following is from the opinion of the court:

The general rule is that a trial for a felony cannot be had without the personal presence of the accused. We have a statute which recognizes and embodies this rule. How. Ann. St. Sec. 9568. It is also well settled that the trial is not concluded until the verdict is received and recorded. There are cases which hold that a verdict rendered in the absence of a prisoner, whether he be in custody or out on bail, is void. State v. Hurlbut, 1 Root, 90; Clark v. State, 4 Humph. 254; Sneed v. State, 5 Ark. 431. Few cases will be found which go to this extent, and in nearly all of the cases where a verdict rendered in the absence of the accused has been held erroneous the respondent has been in custody, and has therefore been prevented from attending. When, however, the absence of the

prisoner is not an enforced absence, but is voluntary, as when he is out on bail, and has been present pending the trial, but voluntarily leaves the court room pending the deliberations of the jury, or neglects to appear at the adjourned hour of the court, the clear weight of authority favors the rule that a verdict rendered under such circumstances is valid and binding. In Arkansas a statute enacted since the decision of Sneed v. State, *supra*, Brown v. State, 24 Ark. 620, and Osborn v. State, *Id.* 629, provides that, if defendant escape from custody pending the trial, or, if on bail, he shall absent himself, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney. The constitutionality of this statute was upheld in Gore v. State (Ark.), 12 S. W. Rep. 564. In Hill v. State, 17 Wis. 697, it was held that the burden was upon the prisoner to show that he was deprived of the right to be present. In Wilson v. State, 2 Ohio St. 319, held that when defendant is on bail it is not error to receive a verdict in his voluntary absence. In Fight v. State, 7 Ohio, 181, respondent, being on bail, had absconded during the trial, and it was held proper to proceed with the trial. In Rose v. State, 20 Ohio, 31, the prisoner was in custody, and it was held that a verdict received in his absence should have been set aside. In Sablinger v. People, 102 Ill. 241, held that, where a prisoner, pending the trial, voluntarily abandons the court room, he will be regarded as having waived a right which is guarantied to him, and the court may proceed in his absence. In Price v. State, 36 Miss. 531, it was held that, where defendant voluntarily absents himself, he cannot complain. In Finch v. State, 53 Miss. 363, respondent was in custody. In Barton v. State, 67 Ga. 653, the court say the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury. "Any arrangement he had made with a private person to let him know when the jury would be ready to deliver the verdict, and the failure of such person to comply with his promise, cannot affect the point. It was his duty and obligation in his bond, as well as his right, to be present until the close of his trial—the rendition of the verdict; and, being free, it was for him to provide so as to be present." The court distinguishes that case from former decisions where respondent was in custody at the time of the rendition of the verdict. In Lynch v. Com., 88 Pa. St. 189, defendant was on bail, and left the court room while the jury were out, and in his absence the jury came in and rendered the verdict. Held to be no ground for a motion in arrest of judgment. The New York cases called to our attention do not determine the question here presented. In People v. Perkins, 1 Wend. 91, the prisoner was in custody. In Maurer v. People, 43 N. Y. 1, the jury returned into court at midnight, and, in the absence of the prisoner, asked certain questions, to which the court replied. It does not appear from the reported case whether the prisoner was at liberty or not. In Mills v. Com., 7 Leigh, 751, the verdict was defective, in that the jury had not fixed the term of imprisonment, and the court undertook to supply the omission after the discharge and separation of the jury. State v. Alman, 64 N. C. 364, involved the right of the court to discharge the jury, which had failed to agree, in the absence of the accused. In the recent case of Com. v. McCarthy (Mass.), 40 N. E. Rep. 766, the question has been fully considered, and the rule adopted that, when a defendant on trial for felony, who is on bail, voluntarily absents himself without leave when the jury retire for deliberation, and remains absent, a verdict rendered in his absence will be binding.

MARRIED WOMAN—FUNERAL EXPENSES.—**In Gould v. Monlohan, 33 Atl. Rep. 483, decided by the Prerogative Court of New Jersey, it was held that where a married woman dies, leaving an insolvent husband surviving her, a proper third person, who has borne the necessary expenses of her suitable burial, may recover from her estate. The court says:**

Every person has the right to have his or her body, after death, decently buried. Reg. v. Stewart, 12 Adol. & E. 773; Chapple v. Cooper, 13 Mees. & W. 252; Patterson v. Patterson, 59 N. Y. 583; McCue v. Garvey, 14 Hun, 562. The reasonable and necessary expense of according that right is chargeable to his or her estate. Patterson v. Patterson, *supra*. The duty of securing the right ordinarily rests with the personal representative, and if there be no such representative, or, if existing, the representative fails to act, the exigency of the situation will permit a proper third person to afford the right, in favor of whom the law will imply, from the representative's obligation, a promise upon the part of the latter to reimburse the reasonable expense of the interment, to the extent of the assets of the decedent's estate which may become available for that purpose. The implication of such a promise is a recognized exception to the rule that an action will not lie for a voluntary courtesy. Force v. Haines, 17 N. J. Law, 389; Patterson v. Patterson, *supra;* Lakin v. Ames, 10 Cush. 221. In case of the death of a married woman, the duty to bury her and discharge the expense of so doing devolves upon her husband, if he shall survive her. Jenkins v. Tucker, 1 H. Bl. 90; Bertie v. Lord Chesterfield, 9 Mod. 31; Ambrose v. Kerrison, 10 C. B. 776; Bradshaw v. Beard, 12 C. B. (N. S.) 344; Cunningham v. Reardon, 98 Mass. 538; Weld v. Walker, 130 Mass. 432; 2 Bright, Husb. & W., 521; Macq. Husb. & W., 191; Schouler, Husb. & W., section 412; Eversley, Dom. Rel. 305. His liability for the expense of the interment does not arise in virtue of any interest he may have in the wife's property, but from the personal advantage it is to himself to have those *personæ conjunctæ* with him, his wife and lawful children, properly maintained during life, and suitably buried at death. The question whether, if the husband shall perform this duty, he may be reimbursed from his wife's separate estate, is not presented in this inquiry. The cases dealing with that subject appear to be somewhat at variance. See, among others, Gregory v. Lockyer, 6 Madd. 99; McCue v. Garvey, 14 Hun, 562; Freeman v. Coit, 27 Hun, 447; *In re* M'Myn, 33 Ch. Div. 575; Darmody's Estate, 13 Phila. 207. The point in the present inquiry is whether, where the husband is unable to bear the expense of his wife's burial, her estate may be held liable for it. But for the husband's survival of his wife, the obligation to bury her, and to pay the expense of that burial, would rest upon the representative of her estate. Is the husband's obligation in such case substituted for the representative's so that its existence discharges the representative's or is it additional and primary thereto? I am of opinion that the latter clause of this question is entitled to the affirmative answer; that there is a double obligation when a married woman dies leaving a husband—a primary obligation on the husband, and a secondary obligation upon the representative of her estate; and that the mere existence of the husband's primary obligation does not discharge the estate's secondary obligation, although the husband's

performance of his obligation may effect such discharge. The wife is entitled to be suitably buried at the expense either of her husband or of her estate; otherwise the wealthy wife of an insolvent husband might be subjected to the burial of a pauper. And it appears to me to follow that upon the failure of the primary obligation, for any reason, the secondary may be enforced. Common decency and humanity are regarded by the authorities as authorizing a speedy burial of a decedent by any proper person, unobstructed by hesitation in measuring the responsibilities of the husband and representative, and such exigency affords a strong reason why both those responsibilities for reimbursement shouldremain available. By the stipulation in the present case, it appears that the husband is insolvent, and therefore any effort to recover from him as the primary obligee would be abortive, and hence that immediate demand against the representative is proper.

EXTENT OF THE POWER AND AUTHORITY OF THE PRESIDENT OF A CORPORATION TO BIND IT BY CONTRACTS.

§ 1. The extent of the power and authority of the president of a corporation to bind it by contracts is not well defined or established by the authorities, although it is a matter of great importance in these days, when so much of the business of the country is controlled by and in the hands of corporations. The difficulty in drawing any general rule from the decided cases arises out of the fact that, in considering the subject, courts have approached the matter from different points of view, and generally with a fixed determination to arrive at a desired result—generally the correct one—in the particular case.

§ 2. *The Law of Agency as Applied to the Question.*—In many cases the subject is considered solely in the light of the law of agency. Thus, in Sparks v. The Dispatch Transportation Co.,[1] in discussing the power of the president of a corporation to bind it by notes given by him for mules purchased by him for the corporation, it is said: "The power of Jackson (the president) to bind the defendant (the corporation), is governed by the law of agency. The principle underlying is the same whether the principal be a corporation or an individual. * * * He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business." It is to be noticed that the last sentence quoted is subject to this criticism, viz.: that the last clause thereof is not in harmony with the first, unless it is taken with the qualification that the "acts of an ordinary nature, which by usage or necessity (*sic*) are incident to" the president's office, are such acts as he has been allowed by the directors to do for such a length of time as to establish a uniform custom and thus to furnish proof of an agency to do the acts by implication of law.

§ 3. *The Agency View Continued.*—In support of this view that the principles of the law of agency should control and determine the power of the officers of a corporation, it may be said that a corporation is a distinct legal entity: an artificial person clothed with certain rights and privileges, and that its corporate acts must all be done by natural persons representing it. The officers are not, in contemplation of law, the corporation.[2] In transacting its business they act for and in its behalf. The board of directors is the governing body, and they, acting as a board, may exercise all the power which has been conferred on it by law.[3] In case an act of an officer affecting, or apparently affecting, the rights of the corporation comes under review, the question arises did the officer have authority to do this act? If the question is answered with reference to the rules of law relating to the powers of agents, which seems to be a reasonable treatment of the subject according to legal conceptions, it will be found that the source of the powers of an agent is threefold: First. Powers expressly granted by the principal. Second. Powers which are implied from the known usages of trade and business, of which the courts take judicial notice, in respect of the particular species of agency; or which, in case of officers of a corporations considered as agents, are held to have been conferred, and therefore are implied by law, from evidence of a uniform course of business or custom established by the corporation in the

[1] (1891) 104 Mo. 531, p. 539.

[2] Numerous cases announce this apparently self evident proposition. The following are cited as aptly illustrating the same. Humphreys v. McKissock (1890), 140 U. S. 304, 312; Hill v. Rich Hill Coal Mining Co. (1893), 119 Mo. 9; England v. Dearborn (1886), 141 Mass. 590.

[3] *Idem.*

management of its affairs in relation to matters of the same general nature as the particular act in controversy. Third. Powers which arise, upon a principle of estoppel, by the acquiescence of the principal in the acts of the agent done in behalf of the principal, without express authority previously granted. In addition to these means of proof of the powers of an agent, may be mentioned: Fourth. The adoption of the unauthorized act of an agent by a subsequent ratification by the principal after coming to a knowledge of the doing of the unauthorized act.[4]

§ 4. *Means of Proof of the Authority of the Officer.*—The authority of the officer to do the particular act may be shown in many ways. The charter of the company may have conferred the power; the by-laws or a special resolution of the board of directors may have conferred it; or it may be inferred as a matter of fact from the usage and practice of the company in permitting the officer to transact matters of the same nature as the act in question. This view is well stated in Fifth Ward Savings Bank v. First National Bank.[5] "The powers of the officers of a corporation over its business and property are strictly the powers of agents—powers either conferred by the charter or delegated to them by the directors or managers, in whom, as the representatives of the corporation, the control of its business and property is vested. * * * Where in the usual course of business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and responsibility will be laid upon the principal for the acts of the agent within the apparent authority so conferred upon the agent—a doctrine which which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases the authority of the officer does not depend so much on his title, or on the theoretical nature of his office as on the duties he is in the habit of performing."

[4] The Famous Shoe & Clothing Co. v. The Eagle Iron Works (1892), 51 M. A. 66.

[5] (1886) 48 N. J. L. 513.

§ 5. *Authority Implied from Usual Course of Business.*—The company may, by a course of conduct with its officers and the public, give to such officers authority and confer upon them powers they would not have as such officers but for the usages of the corporation.[6] And where the authority of the officer is left to be inferred by the public from powers usually exercised by him, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject matter.[7]

§ 6. *Facts Evidentiary of Implied Authority.*—Under such circumstances the authority of the officer may be proved by parol and need not be in writing. It may be collected from the circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been permitted without interference, to conduct such affairs. It may be implied from the conduct or acquiescence of the corporation, as represented by its board of directors. When during a series of years or in numerous business transactions he has been allowed, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the corporation and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from, or authority given by those who have the right to control his operations.[8]

§ 7. *By-laws of Corporations as Affecting Implied Authority.*—In cases where the limit of the authority of an officer to bind the corporation by his acts in its behalf depends upon and is to be ascertained from the usual course of conduct pursued by him in transacting the business of the company, and the recognition of his acts by the corporation, it is quite obvious that the limitations upon the authority of such officer contained in the by-laws of the company are immaterial if they

[6] Winsor v. Lafayette Co. Bank (1885), 18 M. A. 665; Merchants' Bank v. State Bank (1870), 77 U. S. (10 Wall. 604; State *ex rel.* v. Heckart (1892), 49 M. A. 280; First National Bank v. The N. Mo. Coal Co. (1885) 86 Mo. 125.

[7] Merchants' Bank v. State Bank (1870), 77 U. S. (10 Wall.) 604; First Nat'l Bank v. N. Mo. Coal Co. (1885), 86 Mo. 125.

[8] Martin v. Webb (1884), 110 U. S. 7. See, also, cases cited below, note 16.

are in conflict with the general course of conduct so followed and recognized. In such cases it is uniformly held that the rules and regulations of a corporation as to making contracts, and its by-laws defining the powers and duties of its officers are not binding on persons who have dealt with the officers in good faith and without notice of such by-laws and rules. The by-laws are private and only accessible to the officers and members of the company, and in this respect are like the secret instructions given to a general agent, not binding on those who deal with the officers whose authority has become established by a uniform course of conduct pursued in disregard of the by-law or other rule of government adopted by the company, and which have thus been allowed to pass into desuetude.[9] But where the authority of the officer is not established by evidence of a general course of conduct, and no circumstances exist out of which the law, in its aim to enforce natural justice, raises an estoppel *in pais* against the corporation, it is held that a person dealing with a corporation is bound to take notice of its constitution or charter, by-laws, and ways of doing business thereby prescribed.[10] And in such a case, where a by-law gives the president of a corporation "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation," this does not include authority to do an act, which another by-law expressly gives to a separate committee. The matter of authority in such a case must be determined by the by-laws.[11]

§ 8. *Authority of the President of a Corporation. General rule Formulated.*—Touching the authority of the president of a corporation, an examination of the decided cases leads to the following conclusions, which seem to be based upon considerations of wise, public policy, and the necessities growing out of cases of this nature.

(1.) *Authority Presumed Virtute Officii.*—The president of a corporation is the legal head of the body, and in the absence of legislative enactment, or express provisions made in the by-laws, the corporation acts through him. When an act pertaining to the business of the company is performed by him, in his official capacity, and its effect upon the company is in question, the presumption will be indulged in that the act is legally done and is binding on the company.[12]

§ 9. (2.) *Authority Presumed.*—In such cases, and until the contrary is shown, it will be presumed that the president, *virtute officii*, is the general agent of the corporation with authority to do the act done by him in his official capacity, if it be done in the line of business of the corporation, or if it be necessary to carry on such business.[13]

§ 10. (3.) *These Presumptions may be Repelled.*—But this presumptions is not conclusive, and may be repelled by evidence that the authority to do the act in question was not vested in the president, but in some other officer, or in a committee, either by the by-laws of the company, or by special resolution of the board of directors; and if in point of fact he has not authority to do the act, the company will not be bound by it. For, after all, the president is not the corporation, but merely its agent, and the principal will not be charged by his act unless it falls within the scope of his agency.[14] And if it is shown that the act done is not one fairly falling within the usual course of business of the company, or is not incident to such business

[9] Smith v. Smith (1872), 62 Ill. 493; Walker v. Railroad Co. (1886), 26 S. Car. 80; Arapahoe Cattle & Land Co. v. Stevens (1889), 13 Colo. 534, 22 Pac. Rep. 823.

[10] Relfe v. Rundle (1880), 103 U. S. (13 Otto) 222, p. 226; Bockover v. Life Asso. of America (1883), 77 Va. 85 p. 90; Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128.

[11] Twelfth Street Market Co. v. Jackson (1883), 102 Pa. St. 269.

[12] Musser v. Johnson (1868), 42 Mo. 74; Smith v. Smith (1872), 62 Ill. 493; McKiernan v. Lenzen (1880), 56 Cal. 61; Mo. Fire Clay Works v. Ellison (1888), 20 M. A. 67; Bambrick v. Campbell (1889), 37 M. A. 460 p. 463; Sherman, etc., Co. v. Swigart (1890), 43 Kan. 292, 19 Am. St. Rep. 137; McDonald v. Chisholm (1890), 131 Ill. 273; Glover v. Wells (1890), 40 Ill. App. 350; Glover v. Lee (1892), 140 Ill. 102; State *ex rel.* v. Heckart (1892), 49 M. A. 280.

[13] Washburne v. Nashville, etc., R. R. Co. (1859), 3 Head (Tenn.), 638, 75 Am. Dec. 784; Oakes v. Cataraugus Water Co. (1894), 143 N. Y. 430, and cases cited in note 12.

[14] Websterfield v. Radde (1877), 7 Daly (N. Y. Com. Pleas), 326, followed in Rathburn v. Snow (1889), 3 N. Y. Suppl. 925; and Bohn v. Loewer's Gambrinus Brewery Co. (1890), 9 N. Y. Suppl. 514; Bockover v. Life Asso. of Am. (1883), 77 Va. 91; Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128; Credit Co. v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. Rep. 123; Hyde v. Larkin (1889), 35 M. A. 365; Asher v. Sutton (1884), 31 Kan. 286; Sparks v. The Despatch Transportation Co. (1891), 104 Mo. 531.

the presumption of authority arising from the official station of the president is not available.[15]

§ 11. (4.) *Corporation Bound by Unauthorized Act of President, if Facts Raise an Estoppel against it.*—But, notwithstanding the fact that there may be no express authority given in the charter or by-laws to the president to do or transact the particular act or business matter in controversy; and notwithstanding the fact, that there may be a by-law of the corporation, or a resolution of the board of directors vesting the power in some other officer or committee, and directly, or by necessary implication taking it out of the president's hands, still the company may be bound by the act, if circumstances are shown which raise an estoppel *in pais* against the corporation; or which tend to prove the fact that the president has generally done acts or transacted business of the same general nature, for a period sufficiently long to establish a a settled course of business; or that he has been allowed, with the knowledge of, but without interference, by the board of directors to conduct such affairs; or, that he has been permitted through a series of years, or in numerous similar business transactions, to pursue a particular course of conduct in his official capacity, without objection, it will be presumed, as between the corporation and those who, in good faith, deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control his actions in that regard, and the company will be bound by his acts.[16]

[15] N. Y. Iron Mine v. Negaunee Bank (1878), 39 Mich. 644, 651; Asher v. Sutton (1884), 31 Kan. 286.

[16] Sherman v. Fitch (1867), 98 Mass. 59; Merchants' Bank v. State Bank (1870), 77 U. S. (10 Wall.) 604; Washington Mutual Fire Ins. Co. v. St. Mary's Seminary (1873), 52 Mo. 480; Kiley v. Forsee (1874), 57 Mo. 390, 396; Kraft v. Freeman (1881), 87 N. Y. 628; Martin v. Webb (1884), 110 U. S. 7; First Nat'l Bank v. N. Mo. Coal Co. (1885), 86 Mo. 125; Fifth Ward Savs. Bank v. First National Bank (1886), 48 N. J. L. 513, p. 527; Credit Co. v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. Rep. 123; Indianapolis Rolling Mill v. St. Louis, Fort Scott & W. R. R. Co. (1887), 120 U. S. 256; Glover v. Wells (1890), 40 Ill. App. 350; Sparks v. Despatch Transportation Co. (1891), 104 Mo. 531; Washington Savings Bank v. Butchers' & Drovers' Bank (1891), 107 Mo. 133; Moore v. Gaus & Sons Mfg. Co. (1892), 113 Mo. 98; Oakes v. Cataraugus Water Co. 1894), 143 N. Y. 430; Leroy & C. V. Air Line R. R. Co. v. Sidell (1895), 66 Fed. Rep. 27 p. 31; Mo. Pac. Ry. Co. v. Sidell (1895), 67 Fed. Rep. 464.

§ 12. (5.) *The same Result follows if the Unauthorized Act is Ratified.*—And so although the act is done by the president without authority in the first instance, if the corporation, after coming to the knowledge of the act done it its behalf ratifies or adopts the same—as for instance, by accepting the benefits thereof—it will be bound as effectually as if the act had been done with full original authority.[17] Such ratification need not be manifested by a vote or formal resolution. It may be proved by acquiescence or silence; and only slight evidence is required when knowledge is brought home to the corporation.[18] But there must be evidence of knowledge, or of facts from which knowledge may be inferred as a legal consequence, before a ratification can be charged against the corporation. And in this connection it must be borne in mind that the knowledge of the officer acting in behalf of the corporation without actual authority is not imputable to the corporation.[19]

§ 13. (6.) *Where Authority is Implied or the Company is Estopped to Raise the Question, By-laws are not Available to Prove Want of Authority.*—Where the acts done have been done under such circumstances as to raise an estoppel *in pais* against the corporation, the existence of a by-law or special resolution of the board of directors, limiting the president's authority to do the act in question, or depriving him wholly thereof, if the other party had no notice of the same, is immaterial; for in such cases these are regarded as secret instructions to a general agent, of which the other party to the transaction, acting in good faith and in ignorance thereof, is not bound to take notice, and by which he is not affected.[20]

St. Louis. JACOB KLEIN.

[17] Railway Companies v. Keokuk Bridge Co. (1888), 131 U. S. 371; Fitzgerald Const. Co. v. Fitzgerald (1890), 137 U. S. 98; Washington Savings Bank v. Butchers' & Drovers' Bank (1891), 107 Mo. 133.

[18] *Idem.*

[19] Twelfth Street Market Co. v. Jackson (1883), 102 Pa. St. 269; Hyde v. Larkin (1889), 35 M. A. 365, p. 373.

[20] Royal Bank of India's Case (1869), L. R. 4 ch. 252; Smith v. Smith (1872), 62 Ill. 493; Walker v. R. R. Co. (1886), 26 S. Car. 80; Arapahoe Cattle & Land Co. v. Stevens (1889), 13 Colo. 534, 22 Pac. Rep. 823; McDonald v. Chisholm (1890), 131 Ill. 273; Glover v. Lee (1892), 140 Ill. 102.

TRIAL COURTS — ADOPTION OF RULES—SELECTION OF SPECIAL JURY—PROHIBITION.

ST. LOUIS, KEOKUK & N. W. RY. CO. V. JAMES E. WITHROW.

Supreme Court of Missouri, February 18th, 1896.

The circuit court of the city of St. Louis has power under the statutes and constitution of the State to adopt reasonable rules governing the selection of a special jury to try causes therein.

An order of such court upon the jury commissioner, to draw and furnish for the trial of a cause, a special venire "of forty-five good and lawful men" without other designation of qualifications is valid.

The supreme court has discretionary power to award a writ of prohibition to keep a trial court within the confines of its authority although such question might be determined on a review, by appeal or writ of error, of the cause wherein erroneous jurisdiction may be asserted.

BARCLAY, J.: This is an original application for a writ of prohibition to Judge Withrow, one of the judges of the circuit court in the city of St. Louis. The purpose is to prohibit him from enforcing a rule of court in regard to the selection and empanelment of special juries that may be ordered in that court. Both parties to a cause pending in the division (or special term) over which Judge Withrow presides unite in the application for a prohibitory writ. The facts are admitted. The object of the action before Judge Withrow is to condemn for railroad purposes a strip of land in St. Louis. The railway company is plaintiff, and the Knapp-Stout & Co. Company is defendant. The defendant applied in due time "for a special jury." The application was granted, upon a deposit of the required sum to meet the expenses thereof. The order further declared. "And the court doth direct the jury commissioner of the city of St. Louis to draw and furnish to the sheriff of the city of St. Louis, the names of forty-five good lawful men, and said sheriff is ordered to summon the persons so named to be and appear in room 3 of this court on Monday, October 14th, 1895, at 10 o'clock A. M., then and there to serve as special jurors until discharged by the court." Neither the application for the special jury nor the order allowing it contains any specification of qualifications of the jury, by class, trade, occupation, residence, or otherwise. The case came on for a hearing. The judge announced that the parties would be required to select the trial jury in accordance with rule 37 of the court which is as follows:

1. When a special jury is ordered, the court making the order will designate therein the number of jurors to be drawn, not less than forty nor more than fifty, and thereupon the jury commissioner shall draw the number so designated from the jury wheel in the same manner as jurors for ordinary service are drawn, and shall furnish a list of the names so drawn to the sheriff to be summoned, and shall also furnish four other lists, two for the court, one for the plaintiff, and one for the defendant.

2. On the day of the return of the special venire, after the sheriff, on order of the court, shall have called the list and ascertained who of them are present in court, the lists for the parties will be given them or their attorneys, showing those jurors who have answered the call; then when the trial is to begin, all the jurors of that venire present, except such as may have been excused by the court, will be called into the box to be questioned on their *voir dire*, and the court will hear and determine all challenges for cause, if any, and purge the list of the disqualified; then from the list so purged, the plaintiff and defendant, or their attorneys respectively, will select eighteen jurors, to-wit, nine each; this selection will be made as follows: The plaintiff will mark on the list nine names, then the defendant will mark nine names; this selection will be so conducted that the jurors selected will not know by whom they are chosen; from this array of eighteen jurors so selected each side will strike off three names, and the remaining twelve will be the jury to try the cause; should either party decline to participate in the selecting or striking off of the names of jurors as above described, the sheriff will perform that duty for him, and should both sides so decline the sheriff will do so for both.

3. If, after the list has been purged, as provided in paragraph 2, *supra*, there should remain less than twenty-seven names of qualified jurors from which the eighteen are to be selected as above prescribed, the court will postpone the trial to a convenient time later, and order an additional number of jurors, who will be drawn, summoned and selected in like manner as above provided, so as to bring the number of qualified jurors from whom the array of eighteen are to be selected up to at least twenty-seven."

The forty-five jurors had been duly summoned in accordance with the order, but both parties moved to vacate it and to "quash the panel," because the order had required the jury commissioner to furnish the names of the jurors to the sheriff. On various grounds both parties indicated objections to the rule mentioned, and to its enforcement in the condemnation case. After overruling the objections, the judge adjourned the trial to a future day in order to allow the parties time to have the correctness of his action reviewed in the present proceeding, which was promptly brought. The defendant judge in response to the rule to show cause, after admitting the facts set forth in the application for a prohibition, made further return as follows: "That said rule was unanimously adopted by the judges of said court in general term by authority of Sec. 27, Art. 6, of the constitution of Missouri authorizing them to make rules, and of Sec. 29, of article 21, of the appendix to the revised statutes of 1889, directing that special juries shall be selected by the jury commissioner in the manner directed by the court, which provision of the statute is found on page 2160, revised statutes of

1889. That it was formulated and adopted by said judges as the result of their long experience in the practical operation of the special jury law applicable to the eighth judicial circuit. That the same is a valid exercise of judicial power under the constitution and laws of this State, and is binding upon him and he deems it to be his duty to enforce the same unless prohibited therefrom by this honorable court." In this state of the record the case here has been argued by the plaintiffs and submitted for decision, as upon an application to make the rule absolute. The seven circuit judges of St. Louis (including Judge Withrow have submitted printed suggestions indicating the grounds on which they saw proper to adopt rule 37. 1. Neither party questions the propriety of the use of prohibition to reach a prompt decision upon the validity of the rule of court. But that fact does not warrant us in ignoring all inquiry as to our jurisdiction to entertain the proceeding. It is evident that either party to the case before Judge Withrow might except to the court's action in regard to the jury, let that cause go to judgment, and thereafter review the ruling by appeal or writ of error. But, on the other hand, a decision as to the correctness of the circuit ruling is said to involve a decision upon the power and authority of the court to proceed as indicated by the rule in dispute, and hence of its lawful authority to enforce the rule. The petitioners here insist that the circuit court has no authority to require the cause to be tried in the manner indicated by its orders and rulings already made. Prohibition undoubtedly is applicable, legitimately, as well to keep a court within the orbit of its power in dealing with some phase of a case, as to prevent its taking cognizance of an action or proceeding which the court has no power to entertain at all. State v. Riddell (1831), 2 Bailey (S. C.), 560; Appo v. People (1860), 20 N. Y. 531. Especially may the writ be used for the former purpose by a court invested with "general superintending control" over the circuit courts, as is the supreme court according to our fundamental law. Const. 1875, Art. 6, Sec. 3. A question of jurisdiction in respect of an incidental matter of procedure in a pending cause does not ordinarily form a basis for demanding, as matter of right, a writ of prohibition. If the court of which that writ is asked is of opinion that the remedy by appeal or writ of error is ample and adequate to correct an erroneous ruling on such a question, it may decline to interfere during the pendency of the original litigation. But if the mooted question involves an issue of jurisdiction in the trial court to act in the particular matter complained of, the superintending court has discretionary power to award the writ of prohibition to keep the court of first instance within the confines of its authority, where the circumstances justify the call for that remedy. In cases of the kind just described the use of prohibition is truly discretionary, when appeal or error would be also ultimately available. The recent statute regulating proceedings in prohibition (Laws, 1895, p. 95) does not change the pre-existing law as to the proper occasions for the awarding of that writ. It merely undertakes to prescribe certain rules of procedure to obtain it. We shall not, however, pause further to inquire into the applicability of the remedy in this instance, inasmuch as we are of opinion that no prohibition should be granted on the merits. We are not entirely satisfied that it should be denied on the preliminary issue as to the appropriateness of the relief sought, so we have looked into the substance of the controversy. 2. The chief complaint of plaintiffs in the case at bar is that the order by Judge Withrow did not direct any selection of the jurors either by the jury commissioner or by the sheriff, or point out any qualifications which the special jurors should possess. But plaintiffs also challenge the power of the court to require the panel for the case to be chosen in accordance with the thirty-seventh rule of the circuit court of the city of St. Louis. The ordinary method of selecting jurors for service in St. Louis is pointed out by the law of 1879, Rev. Stat. 1889, p. 2160, art. 21. That statute has been since amended in some particulars which need not be specially noted, but one amendment is as follows: "In every city in the State of Missouri having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names of the persons to be summoned for such special jury, and said officer shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party. The provisions contained in sections 17, 18, 19, 20, 21, 23, 24 and 25 of this act, in relation to the summoning and service of common jurors, and to the duties and liabilities of persons in said sections respectively mentioned, and to the penalties in said sections respectively provided for in respect to common juries, shall, in like manner, be construed to apply also to the summoning and service of special juries, as by this section provided for." Laws 1885, p. 74; Rev. Stat. 1889, p. 2169, Sec. 29.

The general provisions on this topic in the last revision of the statutes (1889), are these: "Sec. 6089. *Special Venire — How Obtained and Paid.*—Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county or city, and triable by a jury,

shall be entitled, as of course, to an order for special venire, on motion made therefor, three days before that on which the case is set for trial; but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed as other costs against the losing party. This section shall apply to cities having over three hundred thousand inhabitants, as fully as to all other parts of the State." It will not be needful in this case to consider any clash there may be between the terms of this section and of the act of 1885 quoted. Turning now to the law regulating the circuit court, city of St. Louis, we note that the present court was organized under a special statute in 1865 (Laws 1865, pp. 70-76, Rev. Stat. 1889, p. 2145), which has since been occasionally amended. But in the original act of 1865 occurs the following passage which has never been altered or repealed: "In addition to the ordinary powers of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein. But all rules for the government of the court at special term shall be the same before each of the judges at such term." Laws, 1865, p. 73, Sec. 14; Rev. Stat. 1889, p. 2147, Sec. 11. In State v. Smith (1889), 44 Mo. 112, the supreme court, in a unanimous opinion by Judge Wagner, held valid a rule of the St. Louis circuit court requiring bills of exceptions to be submitted there within five days, instead of within the term, as then allowed by the existing statute of the State. The same view was taken of another rule of that court in regard to the mode and manner of applying for continuances (Frederick v. Rice [1870], 46 Mo. 24), and again in respect of the time for objecting to the form of questions in depositions. Fox v. Webster (1870), 46 Mo. 181. The same opinion of this power to make rules was also expressed by the court of appeals in State v. Boyle (1877), 3 Mo. App. 603; State v. Wickham (1877), 3 Mo. App. 604; and State v. Wickham (1878), 5 Mo. App. 301. The supreme court decisions already cited were rendered and published (and hence well known to the public) long before the adoption of the constitution of 1875. In that instrument we find the following language in regard to the St. Louis circuit court:

"Sec. 27. *Circuit Court of St. Louis County, etc.* The circuit court of St. Louis county shall be composed of five judges, and such additional number as the general assembly may from time to time provide. Each of said judges shall sit separately for the trial of causes and the transaction of business in special term. The judges of said circuit court may sit in general term, for the purpose of making rules of court, and for the transaction of such other business as may be provided by law, at such time as they may determine, but shall have no power to review any order, decision or proceeding of the court in special term." This provision of the organic law is strongly confirmatory of the power already conceded to that circuit court by the statute, and by the supreme court, in regard to declaring rules of practice. There are many reasons for the grant and exercise of such authority, growing out of the peculiar formation and duties of the court, and of the needs of the people whom it chiefly serves in administering the law of the State. The statutes and decisions already cited will suggest many such reasons to the careful reader, and more could be pointed out by reference to other statutes, imposing peculiar powers and duties on that court. But whatever the reasons therefor, "the power exists," as Judge Wagner said in one of the cases above cited, and the constitution has expressly confirmed the grant. The power, however, relates only to modes of procedure and is limited in its application to cases wherein a rule of court might fairly be held to have a legitimate bearing toward facilitating the business of the court. Even so broad a power to make rules of practice could not justly or reasonably be held applicable to deprive a suitor in that court of any right conferred by the substantive, positive law of the State. The limitations of the power need not be further discussed at this time. The rule 37 is not in conflict with any law touching the mode of empaneling the jury. It conforms to the statute (section 6081) allowing each party to the action to challenge peremptorily three jurors, and it recognizes fully the statutory right of challenges for cause (section 6083). In matters of mere detail it prescribes the mode of proceeding to bring the final jury into the box; but in so doing it does not clash with any command of the written law, and we think that it cannot justly be held to go beyond the proper range of the power of the court to regulate its procedure. We therefore hold that it is valid. 3. But beyond the issue as to the mode of selecting the panel, by means of the legal machinery described in rule 37, lies the further inquiry as to the power of the court to order a special venire "of 45 good and lawful men," without other designation of qualifications. (See the order already recited.) This power plaintiffs deny.

The rule 37 does not touch this point. It opens with the words: "When a special jury is ordered," etc. It would be entirely practical (under that rule and under the system of selecting jurors in St. Louis, established by the law of 1879) for the court to order in a particular case a jury of mechanics, bankers, merchants or architects, and have their names drawn by lot by the jury commissioner. We do not mean at this time to imply whether such an order would be correct, for no such question is in judgment. But the rule of court quoted would not prevent the execution of such an order. Under a former law regulating

juries in St. Louis (before the separation of the city and the county) a method of procedure was pointed out for promptly drawing jurors, the principle of which could be readily applied to the selection of a special jury designated by occupation or residence, though drawn from the wheel by lot in the usual way. Laws, 1857, p. 487, Sec. 3. In the case in view in the trial court there was no order for that sort of a special jury. The call was merely a special one for 45 jurors in the particular case, and we are expected to decide whether the court had authority to make such an order. From an early date in Missouri there has been general legislation authorizing the use of special juries. As early as 1845 the following section appeared in the statutes, slightly changing the law of 1835 on the same topic (Rev. Stat. 1836, 2d ed., p. 343, Sec. 14): "Sec. 14. All courts before whom juries are required have the power to order a special jury of eighteen, for the trial of any civil cause, and when ordered the sheriff shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned." R. S. 1845, p. 628, Sec. 14. In the revision of 1855 the number of the special jury was increased to twenty-four, and the section last quoted was subsequently repeated with that change. R. S. 1855, p. 912, Sec. 24. By the revision of 1865, the opening lines of the section were amended so as to read thus: "All courts of record in which juries are required shall have the power to order a special jury of twenty-four," etc. The rest of the section was retained as last-above written. R. S. 1865, p. 599, Sec. 23. In the statutes of 1879 (section 2802) was a section in all material respects the same as section 6089 of the revision of 1889, already quoted. In these revisions no requirement is found as to the number of a special jury, further than may be inferred from general remarks committing the subject of number of jurors to the discretion of the court. R. S. 1889, Secs. 6084, 6087. One of the local laws regulating the selection of juries in St. Louis and in a few other counties refers to special juries as proper in certain circumstances. Laws, 1850-1, p. 228, Sec. 7. In several reported cases in the supreme court questions have arisen involving the powers and duties of the trial courts in regard to special juries. In Fine v. Pub. Schools (1860), 30 Mo. 166, the St. Louis circuit court ordered a special venire for a jury to be summoned outside the city limits; and the order was sustained. That ruling was afterwards approved in Rose v. St. Charles (1872), 49 Mo. 509. In Union Sav. Assn. v. Edwards (1871), 47 Mo. 448, the supreme court was called upon to consider an exception to a special jury of "bankers, merchants and manufacturers" (as recited in the record of the cause, though the precise terms of the order do not appear in the opinion). After referring to the statutory power authorizing an order for a special jury to be summoned "according to the order of the court," Judge Wagner, on behalf of all the judges, declared: "The special panel may be ordered in the discretion of the court." It is noteworthy in this connection that the law of 1885, already quoted, requires special juries in St. Louis to be selected and summoned by the jury commissioner and sheriff, according to the direction or order of the court. Do not those provisions imply that the court itself is invested with the discretion to determine what sort of special jury shall be summoned? At no time in the history of the State have the trial courts in St. Louis been commanded (by any statute we have been able to discover) to direct the empanelment as special jurors of any particular class or kind of citizens, from among those liable to general jury duty. Nor have those courts been adjudged by any decision to be bound to order such a special jury. That subject has, so far, been left entirely to the judgment and discretion of the trial judge, as the cases above cited indicate. The mode of selecting special juries in vogue in England during the last century is thus described by the great commentator on the English law: "Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel." 3 Bl. Com. p. *357. It should be observed that such juries were ordered, under the common law system, not only on account of the difficulty of the cause, but also, in some instances, to secure impartiality in the selection of the jury, irrespective of the nature of the action. The English law of a more recent period prescribes with considerable particularity the qualifications for special jurors and provides for their selection by lot, unless the court (as it may) shall direct a different course. The Juries Act, 1870 (33 & 34 Vict.) ch. 77, Secs. 6 and 17. In North Carolina where such jurors may be selected by lot, that mode of choice has been commended as preferable to that of committing the matter to the choice of an executive officer of the court. State v. Brogden (1892), 111 N. C. 656; State v. Whitson (1892), 11 N. C. 695. In Wisconsin the designation of a jury by the trial court itself was held a constitutional application of judicial power over the subject of juries in Perry v. State (1859), 9 Wis. 19. While in our own State the naming of two jurors of such a panel by the judge himself was held a proper exercise of authority in Barr v. Kansas City (1894), 124 Mo. 22, 25 S. W. Rep. 562. In the last cited case it was also ruled that in Kansas City "special juries should be drawn from the wheel the same as juries ordered to serve generally for

the term or some other stated period of time." No law of this State has been pointed out which expressly or impliedly requires the court to order a special jury "of more than ordinary intelligence," or "of business men" or of any special class, at the instance of any party who chooses to apply for a special venire. It cannot be possible, nor does the language of any designated law suggest that any party to the most trivial suit may, by paying in advance certain costs, secure an "extra good" jury as "of course." Section 6089 simply purports to confer the right, "as of course, to an order for a special venire," on certain terms. And the law of 1885 quoted commands that when a special jury is ordered "the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names" of the special jury, who are then to be summoned "according to the order of the court," etc. R. S. 1889, p. 2169. Granted that the word "select" is used to describe the action of the jury commissioner, it must also be remembered that the section from which we have just quoted is but part of a chapter or article regulating the selection of juries in large cities, including St. Louis. The rest of the law on that topic must be considered in attempting to reach a correct interpretation of the word "select" in the place where it is found in the act of 1885. All statutes on a given subject should be kept in view in interpreting any portion of them. The jury commissioner in ascertaining the names of an ordinary jury is not absolutely bound to place on any jury list every name drawn therefor from the wheel. If, for instance, it appears that he has drawn the names of persons whom the jury register shows to be dead, or to have removed permanently from the city, after their names were placed in the wheel, the commissioner may draw additional names to supply the deficiency. R. S. 1889, p. 2165, Sec. 16. Furthermore, the language of the law generally in regard to juries plainly shows that the legislature has often used the word "select," in connection with that subject, so as to include as well the idea of drawing persons by lot for a panel, as of the chosing of persons to be so drawn. The "selection of juries," within the plain intent of our statute law, is a term frequently applied indifferently and broadly to all the steps prescribed to obtain the final panel that hears a case. R. S. 1889, Secs. 6059; 6973, and p. 2169, Sec. 27. But whatever doubt there be, springing from a strictly etymological consideration of the word "select," we think should vanish upon weighing the force of the context with which the word appears in the law of 1885 before us. The special jury is to be "selected" by the commissioner "as he may be directed by the court." The court may order a jury to be selected by the jury commissioner by process of drawing, as it may order a jury to be summoned by the sheriff without the intervention of the commissioner at all, under section 16 (R. S. 1889, p. 2165). Cases may be supposed wherein the commissioner might have to exercise a limited power of selection in drawing the special jury, for example, where the court's order called for a jury of men of named occupations, or residing within (or without) certain limits of territory. But the power of such selection is expressly confined within the limits marked by the order of the trial court, to which is thus committed the authority to determine what sort of special jury shall be "selected" and summoned. The commissioner is the hand to execute the order of the court. We consider that the statute does not design to vest in him a discretionary power of selecting special jurors, independent of the directions the court may give. The case at the bar of Judge Withrow's court is a condemnation proceeding in which the valuation of real estate is presumably the only issue involved. Can it be justly said that a court abuses its discretion, in any view of the subject, by refusing a special jury of extraordinary qualifications to try a cause of that nature? Within the meaning of the present law we regard a special jury as one summoned to try a particular case and nothing more, and we hold that it is within the discretionary power of the court ordering the same to determine whether any other than general directions to summon a panel for the special case should be given. Compare 12 Am. & Eng. Ency. of Law, 320. As the court in this instance merely called for 45 good and lawful men, it is not necessary to discuss the effect or validity of any other order for a jury that might have been entered in the cause. We consider that the kind of jury to be summoned in the condemnation case was a matter within the sound discretion of the trial judge, and we discover no abuse of his discretion in ordering a special jury of good and lawful men, and then in following the terms of rule 37 in the manner he saw fit to do. In our opinion the rule for a prohibition should be discharged, and a judgment for the defendant entered. Brace, C. J., and Robinson, J., concur. MacFarlane, J., dissents. But we all agree to transfer the cause at once to court *in banc* in order to expedite a final decision.

NOTE.—*Rules of Courts.*—Rules of court are necessary to the proper exercise of the functions of a court, and have become a very important branch of the law affecting the practice and proceedings of the courts. Works on Jurisdiction of Courts, p. 177. The right may be given and regulated by statute but exists as an inherent power independent of positive law. Shaw v. McNeill, 77 Iowa, 459, 41 N. W. Rep. 166. Without this power it would be impossible for courts of justice to dispatch the public business. Delays would be interminable and delay not unfrequently is the object of one of the parties. Every court, therefore, must have stated rules to go by and they are the best judges of their rules of practice. Snyder v. Bauchman, 8 S. & R. (Pa.) 336; Robinson v. Bland, 1 W. Black. 265; Fullerton v. Bank of United States, 1 Peters (U. S.), 604; Barry v. Randolph, 3 Binney (Pa.), 277; Dubois v. Turner, 4 Yeates (Pa.), 361; Kennedy v. Cunningham, 2 Metc. (Ky.) 538; Brooks v. Boswell, 34 Mo. 474; Resher v. Thomas, 2 Mo. 98;

Vail v. McKernan, 21 Ind. 421; Redman v. State, 28 Ind. 205; Sellars v. Carpenter, 27 Me. 497; Vanatta v. Anderson, 3 Binney (Pa.), 417; Harris v. Commonwealth, 35 Pa. St. 416; Walker v. Ducro, 18 La. Ann. 703; Hill v. Barney, 18 N. H. 607; Ogden v. Robertson, 15 N. J. L. 124; Ferguson v. Kays, 21 N. J. L. 431; Estate of Boyd, 25 Cal. 511; Shoecraft v. Cain, 23 Ind. 169; Coffin v. McClure, 23 Ind. 356; Ollam v. Shaw, 27 Ind. 388; Fox v. Conway Fire Ins. Co., 53 Me. 107; Quynn v. Brooke, 22 Md. 288; Bell v. Betton, 18 N. H. 43; Towamencin Road, 10 Pa. St. 195; Gannon v. Fritz, 79 Pa. St. 303; Stadler v. Hertz, 13 Lea (Tenn.), 315; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Seymour v. Phillips Construction Co., 7 Biss. (C. C.) 460; Texas Land Co. v. Williams, 48 Tex. 602; Haley v. Davidson, 48 Tex. 615; Fisher v. National Bank of Commerce, 73 Ill. 34; Angell v. Plume, etc. Manufacturing Co., 73 Ill. 412; Wyandotte Rolling-Mills Co., 73 Ill. 412; Wyandotte Rolling-Mills Co. v. Robinson, 34 Mich. 428; People v. Chew, 6 Cal. 636; Lynch v. State, 9 Ind. 541; De Lorme v. Pease, 19 Ga. 220. Such rules, however, must be reasonable and must not conflict with the constitution or law of the land. People v. McClellan, 31 Cal. 101; Luckley v. Rotchford, 12 Gratt. (Va.) 60; Gormerly v. McGlynn, 84 N. Y. 284; Redman v. The State, 28 Ind. 205; Wyandotte Rolling Mill Co. v. Robinson, 34 Mich. 428. A court cannot make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law. Krutz v. Griffith, 68 Ind. 444; Krutz v. Howard, 70 Ind. 174; People v. McClellan, 31 Cal. 101; Rice v. Ehele, 55 N. Y. 518. Rules of court should be adopted of record within a reasonable time (State v. Ensley, 10 Iowa, 149; Owens v. Ranstead, 22 Ill. 161; Mix v. Chandler, 44 Ill. 174), and should not be retrospective in their terms. Dewey v. Humphrey, 5 Pick. (Mass.) 187. In many of the States the power to make rules is expressly given by statute, and where such power is limited by statute such limitations must be observed. Gormerly v. McGlynn, 84 N. Y. 284; Works on Jurisdiction, p. 178. A rule of court adopted under a statutory provision authorizing it becomes a law binding upon the court as well as upon the litigants before it. Thompson v. Hatch, 3 Pick. (Mass.) 512. And it is held in some cases that so long as a rule of court remains unrepealed it cannot be dispensed with or suspended in a particular case. Thompson v. Hatch, 3 Pick. (Mass.) 512. But the general rule on the subject is that a court has the power at all times to suspend its own rules or to except particular cases from their operation whenever the purposes of justice require it. United States v. Breitling, 20 How. 252; Clark v. Brooks, 20 How. Pr. 285; Martine v. Lowenstein, 68 N. Y. 456; Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672; Symons v. Bunnell, 20 Pac. Rep. 859; Sheldan v. Risedolph, 23 Minn. 518; Pickett v. Wallace, 54 Cal. 147. This is a power which should be rarely exercised and only for the purpose of avoiding injustice. Walcott v. Schenck, 23 How. Pr. 385. Whether a rule shall be suspended or not is within the discretion of the court, and cannot be claimed as matter of right. Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672. Courts have full power to construe their own rules. Martine v. Lowenstein, 68 N. Y. 456; Bair v. Hubartt, 139 Pa. St. 96, 21 Atl. Rep. 210; Gannon v. Fritz, 79 Pa. St. 303. In some cases it is held that an appeal will not lie from an order of a court that gives a construction to its own rules. This is no doubt true where the question is one of discretion, and the rule affects merely the time when a thing shall be done or the like, but it cannot be true that a court may, in all cases, disregard, misconstrue or violate its own rules and that no appeal will lie from its action. Works on Jurisdiction, p. 179; Thompson v. Hatch, 3 Pick. 512; *Ex parte* Whitney, 13 Pet. 404. But unless it clearly appears, on appeal, that a rule of the court below has been violated the construction put upon it by the latter court will not be reviewed. Nevin v. Morrison, 18 Atl. Rep. 636.

Special Jury.—A special or struck jury is one returned for the trial of a particular case. 12 Amer. & Eng. Encyclopedia of Law, p. 320. According to Bouvier it is a jury "selected by the assistance of the parties." In many of the States, statutes regulate the mode of selection and provide where a special jury shall be granted. The difference between the English method and that used in most of the States is that in the former the officer charged with the duty of making up the list from which the special jury is struck is not obliged to take the names in any order in which they stand on the regular list; he may make a selection. Thompson & Merriam on Juries, § 13. See, also, M. & E. R. R. Co. v. Thompson, 77 Ala. 448. In some States special jury is allowed as of course; in others only in cases of exceptional difficulty or importance. See Thompson & Merriam on Juries, § 12, for general discussion of the subject.

JETSAM AND FLOTSAM.

CURRENT CASE LAW.

In its abstract of recent decisions, a late number of the *Albany Law Journal* has the following:

"Frauds, Statute of—Contract.—The value of work and labor supplied under a contract void by the statute of frauds, is recoverable upon the theory that a benefit has been received, from which springs an implied undertaking to pay the value of such work and labor. Baker v. Henderson (N. J.), 32 Atl. Rep. 700." We have always understood that the prime object of the department of the *Albany Law Journal*, from which the above excerpt is taken, is to keep busy lawyers posted in current case-law, involving either the exposition of new doctrine or some modification of long-settled principles, and that it was not intended to constitute an asylum, so to speak, for veteran rules of law with which every practitioner may reasonably be expected to be familiar. This being conceded, it strikes us that such a case as the above ought to have found no place there. The principle enunciated in this case has been recognized in England, certainly since the case of Mavor v. Payne, 3 Bing. 285, was decided in 1825, and was approved by the Supreme Court of New York in 1826 in the case of Burlingame v. Burlingame, 7 Cow. 92, and affirmed in the same court in the case of Shute v. Dorr, decided in 1830 (5 Wend. 204). That it has long been regarded as law generally in America seems obvious from an article on *quantum meruit* in 20 Cent. L. J. 328.—*Canada Law Journal.*

BOOK REVIEWS.

FOSTER ON THE CONSTITUTION.

The volume before us is volume one of a series which is to contain commentaries on the constitution of the United States, historical and judicial, with observations upon the ordinary provisions of State

constitutions and a comparison with the constitutions of other countries. The author is Roger Foster, a distinguished member of the New York bar, author of a most valuable treatise on federal practice, and lecturer at the Yale Law School. The present volume treats of the features of the constitution from the preamble to the article on impeachment. The author, in its construction, exhibits great learning, much thought and painstaking care, neither the style nor the substance of the book is that of the ordinary dry law book. It is written in an entertaining manner and contains avast deal of general information. It is a volume of seven hundred pages, bound in cloth, and published by the Boston Book Company, Boston.

MERWIN ON EQUITY.

The lectures which compose this book were delivered by Mr. Merwin at the law school of Boston University, and appear now for the first time in print. Though designed and perhaps better adapted for the uses of the student than the practitioner, the latter will find it valuable as laying down in concise and clear manner the underlying or bed-rock principles governing the important subject of equity. To the student it may be said that this is a most excellent treatise, and one which it would be well for him to read carefully. The clear and logical presentation of the subject, the accurate and concise manner in which the doctrines are stated, give it an especial value to him who desires to start out right by constructing a safe foundation upon which to erect the superstructure to follow later. Published by Houghton, Mifflin & Co., Boston and New York.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ABATEMENT — Action on Joint Contract.—If one of two or more defendants in an action at law upon a joint contract die before verdict, the suit abates as to the dead one, and cannot be revived and proceeded against his representative and the survivor.—HENNING V. FARNSWORTH, W. Va., 23 S. E. Rep. 663.

2. ACCOUNTING — Laches—Relief.—A bill by the surviving legatees and their heirs against the sureties on an executor's bond for an accounting will not be sustained where it appears that 15 years have elapsed since the last partial settlement, that neither the executor nor any person having knowledge of the accounts is alive, and no reason is given why a settlement was not had before, and the evidence is such as to render it impracticable to do justice.—RIVES V. MORRIS, Ala., 18 South. Rep. 743.

3. ACCOUNT STATED — Conclusiveness.—A stated account never gives to a party claiming under it the benefit of an absolute estoppel. It establishes *prima facie* the correctness of the items, and, unless this presumption is overcome by proof of fraud, mistake, or error, it becomes conclusive; but that an account stated may be impeached for fraud, mistake, or error is well settled. The party impeaching it, however, has the affirmative of the issue and the burden of proof.—MARTYN V. AMOLD, Fla., 18 South. Rep. 791.

4. ACTIONS — Survival—Colorado Statute.—An action for damages for personal injuries, which, under the common law forms of procedure, would have been an action of trespass on the case, does not survive to and against executors and administrators by virtue of the statute of Colorado which provides that "all actions at law whatsoever, save and except actions on the case for slander, or libel, or trespass for injuries done to the person," shall so survive.—MUNAL V. BROWN, U. S. C. C. (Colo.), 70 Fed. Rep. 967.

5. ADMINISTRATION—Allowance to Widow.—The fact that the widow and children left the State on the death of the husband and father, and continued to reside outside thereof, did not deprive them of the right to the further allowance for their maintenance pending settlement of the estate given by Code Proc. § 973.—GRIESEMER V. BOYER, Wash., 43 Pac. Rep. 17.

6. ALIEN—Contract Labor Law.—In an action to recover the penalty imposed by the contract labor law (23 Stat. 332, ch. 164, § 1, as amended by 26 Stat. 1084, ch. 551), the declaration should contain a particular allegation of a contract between the defendant and the alien whose migration is alleged to have been assisted, setting forth categorically in what such contract consisted, a distinct statement that labor was performed under such contract, and a distinct statement of the acts by which the defendant assisted the alien to immigrate.—UNITED STATES V. RIVER SPINNING CO., U. S. C. C. (R. I.), 70 Fed. Rep. 978.

7. ALIMONY — When Granted.—Our statute in reference to the allowance of alimony to a wife in cases where she is a party defendant refers exclusively to cases of divorce. Where the suit is brought by the putative husband to obtain a decree declaring the marriage void *ab initio*, a court of chancery has power to grant alimony to the putative wife, independent of the statute, and as incident of the jurisdicion of the court in such cases.—PRINE V. PRINE, Fla., 18 South. Rep. 781.

8. ALTERATION OF NOTE—Materiality.—The addition to a note of the words, after the name of the payee, "or holder," and, "a lien is retained on said land until all the purchase money is paid," is a material alteration, and no action can be brought on such note.—MCDANIEL V. WHITSETT, Tenn., 33 S. W. Rep. 567.

9. APPEAL—Supersedeas Bond.—Where, in ejectment, the mesne profits are recoverable, a *supersedeas* bond on error to the federal supreme court covers rents and profits pending the proceedings in error.—TARPEY V. SHARP, Utah, 43 Pac. Rep. 104.

10. ASSIGNMENT — Chose in Action.—The rule of the common law prohibiting the assignment of choses in action is not in force in this State.—WINN V. FT. WORTH & R. G. RY. CO., Tex., 33 S. W. Rep. 593.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—An assignment for benefit of creditors, directing the assignee to sell the personalty at any time, and to rent out the real estate, and providing that if the debts were not paid by a certain date then the trustee should sell the land, one-third cash, the balance in one and two years, is fraudulent, as hindering and delaying creditors.—FARMERS' & TRADERS' BANK v. MARTIN, Tenn., 33 S. W. Rep. 565.

12. CHATTEL MORTGAGES — Equitable Lien.—A mortgage describing the property as a certain number of head of cattle, bearing a certain brand, to be selected by the mortgagee from a herd of a larger number in a certain county, creates, as against a person purchasing the herd of cattle from the mortgagor, with notice, an equitable lien on the cattle.—LAY v. CARDWELL, Tex., 33 S. W. Rep. 595.

13. CHATTEL MORTGAGE — What Constitutes.—A deed or bill of sale of either real or personal property, accompanied by a contemporaneous agreement for reconveyance of the same upon payment of consideration, which shows that the conveyance was made to secure indebtedness, is in effect a mortgage.—PRITCHARD v. BUTLER, Idaho, 43 Pac. Rep. 78.

14. CONSTITUTIONAL LAW — Collateral Inheritance Tax.—Acts 1893, ch. 174, providing for the taxation of estates passing by will to persons other than father, mother, husband, wife, children, or lineal descendants of the owner, is repealed in so far as it is in conflict with Acts 1893, ch. 89, § 7, passed on the same day as the former law, and expressly excluding estates so received by brothers and sisters of the decedent.—BAILEY v. DRANE, Tenn., 33 S. W. Rep. 573.

15. CONSTITUTIONAL LAW — Police Power.—An act making it unlawful for the owner of hogs to permit them to run at large is an exercise of the police power.—HAIGH v. BELL, W. Va., 23 S. E. Rep. 666.

16. CONTRACT — Damages — Evidence.—In an action for breach of an agreement by a landlord to furnish the tenant water for irrigation, whereby the tenant's crops were injured, evidence merely as to the amount of crops which could have been raised if the proper amount of water had been furnished, together with evidence of the market value of such crops, is insufficient as a basis for recovery, without proof of the cost of raising and marketing the crops.—KNOWLES v. LEGGETT, Colo., 43 Pac. Rep. 154.

17. CONTRACT — Suretyship — Accommodation Indorsers.—Code Proc. § 758, providing that when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may cause the question of suretyship to be tried, does not apply to an action on a note against the indorsers only.—ALLEN v. CHAMBERS, Wash., 43 Pac. Rep. 57.

18. CONTRACT—Time as Essence of Contract.—In contracts giving a person an option to purchase a chattel for a given price within a limited time, time is of the essence of the contract, so as to prevent specific performance on failure without excuse to purchase within the specified time.—ROBERTS v. NORTON, Conn., 33 Atl. Rep. 532.

19. CONTRACT—Transfer of Trust Property—Assumption of Debt.—One who, in consideration of the transfer to him of property held in trust for payment of claims of preferred creditors, promises the trustee to pay the claims, is liable on such promise directly to the preferred creditors.—BARTLEY v. RHODES, Tex., 33 S. W. Rep. 604.

20. CORPORATION — Capital Stock — Directors.—The fact that, by statute, directors of a corporation named in the certificate of incorporation can hold office for one year only, does not operate to exempt directors who, on failure of the corporation to elect their successors, continued to act as directors after the year expired, from liability for debts contracted by the corporation while they were so acting, under Mills Ann. St. §§ 487, 491, making directors of a corporation liable for its debts in case of failure to file the certificate therein mentioned.—JENET v. NIMS, Colo., 43 Pac. Rep. 147.

21. CORPORATION—Dissolution—Liability of New Corporation.—When a new corporation, with different stockholders, is formed, it cannot be sued by the creditors, or be held liable for the debts of the old corporation, except upon some special ground, such as having received assets of the old corporation without giving value therefor.—DONNALLY v. HARNDON, W. Va., 23 S. E. Rep. 646.

22. CORPORATION—Execution of Instrument—Corporate Seal.—An instrument averring that the parties had set their hands and seals thereto, with an attesting clause alleging that a corporation party thereto had signed, sealed and delivered it in the presence of two witnesses, who signed their names thereto, sufficiently avers, as against a demurrer, that the seal attached in behalf of the corporation was its common or corporate seal.—JACKSONVILLE, M. P. RY. & NAV. CO. v. HOOPER, U. S. S. C., 16 S. C. Rep. 379.

23. CORPORATION — Note.—A corporation cannot defend an action on a note executed in consideration of a loan made the corporation, on the ground of want of power on the part of the officers of the corporation to execute the note.—ALLEN v. OLYMPIA LIGHT & POWER CO., Wash., 43 Pac. Rep. 55.

24. CORPORATION—Stock—Assessments — Transfer.—After a transfer of corporate stock has been duly made on the books of the company, the transferee becomes liable on assessments.—VISALIA & T. R. CO. v. HYDE, Cal., 43 Pac. Rep. 10.

25. CORPORATION—Stock Subscriptions — Payment in Property.—Where all the stock of a corporation is issued in payment for property and franchises, honestly believed by the parties to be of the par value of the stock, a subsequent creditor of the corporation, with knowledge that the stock was so issued, cannot hold the stockholders liable on the ground of an overvaluation of the property.—TURNER v. BAILEY, Wash., 42 Pac. Rep. 115.

26. COUNTIES—Failure to Repair Bridges.—A county is not, unless expressly made so by statute, liable for injuries sustained from defects existing in a bridge, through failure of its officers to have it repaired.—BOARD OF COM'RS OF JASPER COUNTY v. ALLMAN, Ind., 42 N. E. Rep. 206.

27. COUNTIES — Recovery of Money Paid Officer.—Money paid an officer of the county by the county commissioners in violation of the provisions of the constitution may be recovered back in a suit at law.—ADA COUNTY v. GESS, Idaho, 43 Pac. Rep. 71.

28. COUNTIES—Ultra Vires Contract.—A county has no power under Rev. St. art. 1514, to enter into a contract for a water plant to provide the county buildings and officials with water, by the terms of which private individuals are also to be supplied for a certain period gratuitously. That the contract into which plaintiff county entered with defendant, by which the defendant was to supply the county and others with water, was *ultra vires*, is no defense to an action by the county to recover the consideration paid therefor as the result of defendant's failure to carry out his contract.—EDWARDS COUNTY v. JENNINGS, Tex., 33 S. W. Rep. 585.

29. COURT—Appellate Jurisdiction—Removal of Public Officer.—A proceeding under Pen. Code, § 772, providing for the removal of a public officer for misconduct, on accusation presented to the superior court, in which proceeding, in case the accusation is sustained, a judgment for $500 is also to be rendered for the informer, is not appealable to the supreme court, as a "case at law," involving a demand in excess of $300.—WHEELER v. DONNEL, Cal., 43 Pac. Rep. 1.

30. COURTS—Conflicting Judgments.—The rule that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently

acquiring jurisdiction does not apply to judgments rendered by different departments of the superior court of the city and county of San Francisco, as all departments of such court, combined, form but one court.—BROWN v. CAMPBELL, Cal., 43 Pac. Rep. 12.

31. CREDITORS' BILL—Pleading — Multifariousness.—A bill was brought by judgment creditors of a corporation against the corporation, its directors, and other parties; charging the latter as fraudulent grantees, and seeking to recover the property; seeking to enforce against the directors a personal liability under the Illinois statute, because they consented to the creation of an indebtedness in excess of the capital stock; and also charging the directors with a liability for unpaid stock subscriptions: Held, that the bill was demurrable for multifariousness, because these separate causes of action were of such a nature that the satisfaction of a decree against one defendant would not be a satisfaction of a decree against the others.—VON AUW v. CHICAGO TOY & FANCY GOODS CO., U. S. C. C. (Ill.), 70 Fed. Rep. 939.

32. CRIMINAL EVIDENCE — Homicide—Justification.—On a trial for murder of one who met defendant's sister after defendant ordered him not to do so, correspondence between deceased and the sister, of which defendant, prior to the killing, had no knowledge, showing that deceased asked the sister to have sexual intercourse with him at such meeting, are incompetent to show such facts in justification of the killing.—ROBINSON v. STATE, Ala., 18 South. Rep. 732.

33. CRIMINAL LAW—Assault With Intent to Kill.—It was proper to refuse to charge that, if the evidence gave rise to two theories—one of the defendant's guilt, and the other of his innocence—and the jury could not tell which testimony presented the truth, they should acquit.—JACKSON v. STATE, Ala., 18 South. Rep. 728.

34. CRIMINAL LAW—Bunco Game—Larceny.—One who obtains possession of another's money by inducing him to put it up on a lottery operated in a bunco game, and with the assurance that the money would be returned after a certain number of drawings, the owner not intending to part with his title, is punishable for larceny.—PEOPLE v. SHAUGHNESSY, Cal., 43 Pac. Rep. 2.

35. CRIMINAL LAW — Homicide—Plea of Former Acquittal.—A conviction of murder in the second degree on an indictment for murder in the first degree is an acquittal of murder in the first degree.—STATE v. MURPHY, Wash., 43 Pac. Rep. 44.

36. CRIMINAL LAW—Misconduct of Counsel.—The persistent misconduct of the district attorney in making remarks calculated to prejudice the jury against defendant after objection to such remarks were sustained, and the jury directed to disregard them, is ground for new trial.—HELLER v. PEOPLE, Colo., 43 Pac. Rep. 124.

37. CRIMINAL LAW—Reformatory School — Constitutional Law.—Act March 11, 1889 entitled "An act to establish a school of industry," and providing for the detention therein of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in the county jail provided for such offenses, is not unconstitutional as providing unequal punishment for the same offense.—EX PARTE NICHOLS, Cal., 43 Pac. Rep. 9.

38. CRIMINAL LAW—Separate Trial.—Certain defendants having made statements which were admissible only against themselves, they must be tried separately from the other defendants, as Sess. Laws, 1891, p. 132, § 1, provides that a defendant against whom there is evidence not admissible against other defendants shall be tried separately.—DAVIS v. PEOPLE, Colo., 43 Pac. Rep. 122.

39. CRIMINAL PRACTICE — Indictment — Disorderly Houses.—An indictment alleging that defendant did keep and maintain a disorderly house, and a house where lewd persons did resort, does not state two offenses.—STATE v. DELADSON, Conn., 33 Atl. Rep. 531.

40. CRIMINAL PRACTICE—Larceny—Removal of Goods Levied On.—Code, § 3712, makes it larceny to "fraudulently" dispose of or receive goods with intent to defeat a distress or levy made thereon: Held, that an indictment framed on the language of the statute, which charges that the goods were "unlawfully and injuriously" disposed of, without alleging that it was "fraudulently" done, is insufficient.—DUFF v. COMMONWEALTH, Va., 23 S. E. Rep. 643.

41. DAMAGES — Failure to Furnish Cars — Cattle.—Where defendant had notice of plaintiff's contract to deliver cattle at their destination on a certain day, and failed to furnish cars for the transportation thereof, as agreed, and the cattle depreciated in value by reason of the delay, the measure of damages is the difference between the contract price at their destination, and their market value in their damaged condition at the point of shipment, less the freight.—INTERNATIONAL & G. N. R. CO. v. STARTZ, Tex., 33 S. W. Rep. 575.

42. DEED—Description.—A decision of the trial court that a deed describing the land conveyed as "all that certain quarter of the east half of the southeast quarter of the southeast quarter of section 20 marked pink in the sketch hereunto attached, containing ten acres, more or less," is not void for uncertainty, will not be disturbed.—HUTCHCRAFT v. LUTWIG, Wash., 43 Pac. Rep. 29.

43. DEED—Quitclaim—Bona Fide Purchaser.—A deed reciting that the grantor did "bargain, sell, and convey" unto the grantee certain described land, and containing the *habendum* clause, is not a quitclaim deed, and is sufficient to sustain a plea of *bona fide* purchaser, if the other facts necessary are proven.—STANLEY v. HAMILTON, Tex., 33 S. W. Rep. 601.

44. DIVORCE—Desertion.—The voluntary separation of a wife from her husband while proceedings for divorce are pending between them, where such proceedings are not a sham and pretense, does not constitute such willful desertion as would authorize a divorce therefor.—PALMER v. PALMER, Fla., 18 South. Rep. 720.

45. DOWER ESTATE—Waste.—A widow in possession of a dower estate is not guilty of waste in cutting timber which worked no permanent injury to the estate in remainder, and particularly as the proceeds derived from the sale of said timber were used in making needful repairs.—LUNN v. OSLIN, Tenn., 33 S. W. Rep. 561.

46. ELECTIONS—Official Ballots—Estoppel.—Where a candidate for a county office neglects to have an alleged defect in the official ballot corrected as provided by section 59 of the election laws of this State, he cannot, after the election is had, and he finds himself defeated, raise the objection that the name of the successful candidate was improperly placed upon the official ballot.—BAKER v. SCOTT, Idaho, 43 Pac. Rep. 76.

47. ELECTION CONTEST—Writing on Ballots.—Rev. Stat. 1889, § 4671, provides that a ballot voted with any writing thereon, except the names of persons and the offices to be filled, shall not be counted. Acts 1891, p. 135, § 8, provides that before delivering any ballot to the elector two election judges shall write their names or initials on the back of the ballot, and no other writing shall be on the back thereof, and section 13 repeals all acts inconsistent therewith: Held, that the latter provision repealed the former, so that a ballot on which was written the name of the voter, not appearing to have been placed thereon before it was delivered to him, nor for the purpose of identifying it, should be counted.—LANKFORD v. GEBHART, Mo., 32 S. W. Rep. 1127.

48. EVIDENCE—Parol Evidence — Contemporaneous Writing.—Where parties make an agreement partly in writing and partly by parol, and do not profess to reduce the entire contract to writing, but only a certain part thereof, it is competent to show by parol evidence the entire contract; but the oral agreement must be consistent with and must not contradict the stipulations of the written contract.—HARMAN v. HARMAN, U. S. C. C. of App., 70 Fed. Rep. 894.

49. EXECUTION—Injunction.—The sale of property on execution issued on a void judgment will not on that account be enjoined, the remedy at law, in trespass for the seizure and sale of the property, being adequate.—GEERS v. SCOTT, Tex., 33 S. W. Rep. 587.

50. EXECUTION—Unmarried Man—Exemptions.—The word "householder," as used in Hill's Ann. Code, § 486, relating to exemptions, does not include an unmarried man who has no person dependent upon him for support.—PETERSON v. BINGHAM, Wash., 43 Pac. Rep. 22.

51. FEDERAL COURTS—Circuit Court—Jurisdictional Amount.—A circuit court may take cognizance of a controversy in which the United States are plaintiffs or petitioners, or of a controversy between citizens of the same State claiming lands under grants of different States, without regard to the amount involved.—UNITED STATES v. SAYWARD, U. S. S. C., 16 S. C. Rep. 371.

52. FEDERAL COURTS — Review on Appeal—Circuit Court.—The fact that, in an equity proceeding in the circuit court, a demurrer to the petition on the ground that a proper and final decree had been made, adjudicating all the issues in the cause, and that the court had no power or jurisdiction to grant the petitioners relief, was sustained, does not so clearly show that the jurisdiction of the circuit court was in issue as to dispense with the necessity of a certificate to that effect to the supreme court, as required by Act March 3, 1891, § 5.—VAN WAGENEN v. SEWALL, U. S. S. C., 16 S. C. Rep. 870.

53. FEDERAL COURTS—Terms of Court—Adjournment.—A term of a United States circuit court may be adjourned, in the discretion of the presiding judge, to a distant day, and its regular and continuous session may be resumed on such day, as a part of the same term, though another term of the court has been held, during the adjournment, at another place.—STATE OF FLORIDA v. CHARLOTTE HARBOR PHOSPHATE CO., U. S. C. C. of App., 70 Fed. Rep. 883.

54. FEDERAL OFFENSE—Powers of United States Commissioner.—United States commissioners have no judicial power to hear and determine any matter. Their duties are those of examining magistrates, and upon the examination of a person accused of crime they have only to determine whether there is probable cause to believe that an offense was committed by the defendant, and have no authority to pass upon the credibility of testimony, or to find any fact.—UNITED STATES v. HUGHES, U. S. D. C. (S. Car.), 70 Fed. Rep. 972.

55. FRAUD—Estoppel to Assail.—Where a debtor makes a fraudulent sale of a stock of goods to defeat his creditors, a creditor who, after acquiring knowledge of such fraud, acquiesces therein, and takes no steps to impeach it, but on the contrary goes into partnership with the fraudulent vendee for the purpose of carrying on trade with such goods, treating the sale of such stock to such vendee as being valid, thereby inducing such vendee to alter his position by purchasing new goods from time to time to replenish said stock and to carry on the business, such acquiescing creditor will be estopped from afterwards questioning or assailing such fraudulent sale, as against such vendee, though he was no party to the fraud in its incipiency. The law will not undertake to rectify one fraud by aiding a party in the perpetration of another fraud.—SIMON v. LEVY, Fla., 18 South. Rep. 777.

56. FRAUDS, STATUTE OF—Contract.—A contract for the sale of a mining and pumping plant to be manufactured in accordance with special specification, which requires the furnishing of special engines and pumps, connected by shafting specially fitted, the specially manufactured parts of which would be of little value except in connection with the plant, is not within the statute of frauds, though the bulk of the plant was made up of articles purchased as merchandise by the seller from other parties.—PUGET SOUND MACH. DEPOT v. RIGBY, Wash., 43 Pac. Rep. 39.

57. FRAUDULENT CONVEYANCE.—In an action by a creditor of a mortgagor to set aside a mortgage as fraudulent, the complaint must show that plaintiff was a creditor at the time of the execution of the mortgage.—WEST COAST GROCERY CO. v. STINSON, Wash., 43 Pac. Rep. 85.

58. FRAUDULENT CONVEYANCE.—The impeaching creditor, in order to set aside in whole or in part a voluntary conveyance procured to be made by the debtor husband to his wife, must, under our statute, bring his suit within five years from the execution of the conveyance, unless he shows that it was fraudulent in fact—that is, procured to be made with some dishonest intention; it is not enough to show it to be fraudulent in law, under the statute, by reason of being voluntary.—MCCUE v. MCCUE, W. Va., 23 S. E. Rep. 689.

59. FRAUDULENT CONVEYANCE.—Where property is incumbered to its full value by reason of prior liens thereon, an insolvent debtor may convey it in satisfaction of such prior liens, without rendering it subject to the provisions of § 2, chap. 74, of the Code; for such conveyance is not to the exclusion or prejudice of other creditors, but only amounts to the surrender of a valueless equity of redemption.—JOHNSON v. RILEY, W. Va., 23 S. E. Rep. 698.

60. FRAUDULENT CONVEYANCE—Sale to Bona Fide Purchaser.—A *bona fide* sale, for a fair price, to an innocent purchaser, should not be set aside at the instance of the creditor of the grantor, on the grounds of alleged fraud, for the sole reason that in the opinion of sundry witnesses the property might have brought a larger price if sold on credit.—DOUGLASS v. DOUGLASS, W. Va., 23 S. E. Rep. 671.

61. GARNISHMENT—Conflict of Laws.—Plaintiff is a resident of this State. Defendant is a resident of another State. After this suit had been brought defendant was garnished in the State where he resided as a debtor of plaintiff by a creditor of the plaintiff. After judgment had been rendered in this case, defendant moved the court to suspend the execution thereof until the question of plaintiff's liability should be determined in the suit in which defendant had been garnished. It was not error to overrule such motion.—SHREWSBURY v. TUFTS, W. Va., 23 S. E. Rep. 692.

62. HOMESTEAD—Partition.—Under Act 1877 (Acts 1876-77, p. 32, Code 1886, §§ 2507, 2543), providing that on the husband's death the homestead exempted to the widow and minor children may be retained by the widow and children, and if the estate is insolvent the homestead shall vest in them absolutely, a child, after reaching its majority, the estate being insolvent, is not, during the life of the widow, entitled to any part of the fee of the land, so as to entitle her to demand partition thereof.—SMALLEY v. CHISENHALL, Ala., 18 South. Rep. 739.

63. HOMESTEAD—Reservation in Conveyance.—A constitutional homestead is not an estate, or a condition attached to the land which runs with the estate, but is a determinable exemption conferred on the home, steader, and not on the land, the right being personal, and not *in rem;* so that the right to a homestead in land may be lawfully reserved by an insolvent owner in a mortgage or deed of assignment for benefit of creditors which purports to convey the fee-simple to the land subject to such right.—THOMAS v. FULFORD, N. Car., 23 S. E. Rep. 635.

64. HUSBAND AND WIFE—Deeds—Evidence.—As between grantor and grantee, evidence that the deed was executed on the anniversary of the grantee's wedding; that immediately thereafter the husband of the grantee, by whom the consideration was paid, presented the deed to the grantee as a wedding present, is sufficient to prove that the land was conveyed to the grantee as her separate property.—NIXON v. POST, Wash., 43 Pac. Rep. 23.

65. INSURANCE—Condition as to Ownership.—Where an owner of property has it insured for more than the amount of a mortgage thereon, the mortgagee, to whom the policy is made payable, may, to the extent

of its debt, recover thereon in its own name, and is properly made a plaintiff with the owner in an action on the policy.—GEORGIA HOME INS. CO. v. LEAVERTON, Tex., 33 S. W. Rep. 579.

66. JUDGMENT—Appeal.—After a judgment has been affirmed on appeal, the trial court has no jurisdiction of a suit to enjoin the enforcement of said judgment.—COCHRANE v. DE VANTER, Wash., 43 Pac. Rep. 42.

67. JUDGMENT—Collateral Attack.—It will be presumed, in support of a decree rendered by a State court on a supplemental bill, when it is collaterally attacked in another State, that the judge correctly decided that service of a new subpœna upon the defendant was not necessary, no statutory direction or reported decision of the supreme court of the State to the contrary being cited.—LAING v. RIGNEY, U. S. S. C., 16 S. C. Rep. 366.

68. JUDGMENTS FOR SAME TORT — Satisfaction.—A landowner sued the city and the officers thereof, in separate actions, for damage to her land from a broken sewer, alleging, in the suit against the city, neglect to repair, and, in that against the officers, negligence in making the repair, but in both, as the efficient cause of damage, the same overflow of sewage from the broken sewer. Judgments for damages were had in both actions, that against the city being the greater: Held, that a satisfaction of the judgment against the city was a satisfaction of that against the officers, since they were for the same tort.—BUTLER v. ASHWORTH, Cal., 43 Pac. Rep. 4.

69. LIBEL—Publication—Special Damage.—A publication by a mercantile agency that a party, not shown to be a trader in active business, owes a debt, is not libelous *per se*.—FRY v. MCCORD, Tenn., 33 S. W. Rep. 568.

70. LIBEL AND SLANDER—Pleading.—In libel, it is only where the imputation complained of is a conclusion or inference from certain facts that the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge.—FENSTERMAKER v. TRIBUNE PUB. CO., Utah, 43 Pac. Rep. 112.

71. LIFE INSURANCE—Suicide of Insured.—The personal representatives of one who, when sane, deliberately kills himself, with the intent to secure to his estate the amount of insurance he has effected upon his life, cannot recover the insurance money, though the policy contains no provisions respecting suicide.—RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK, U. S. C. C. OF APP., 70 Fed. Rep. 954.

72. MALICIOUS PROSECUTION — Pleading — Probable Cause.—In a declaration for malicious prosecution, an allegation that plaintiff was bound over by a court of competent jurisdiction and indicted is *prima facie* evidence of probable cause, which can only be negatived by the averment of some additional fact showing that the binding over and indictment were procured by undue means; a general allegation that the prosecution was without probable cause being insufficient.—GIUSTI v. DEL PAPA, R. I., 33 Atl. Rep. 525.

73. MALICIOUS PROSECUTION — Rule of Contempt.—A rule for contempt is the judicial act of the court issuing it, and therefore cannot be the foundation for an action for false imprisonment, however erroneously issued, but may be for malicious prosecution, provided the application for the same is without probable cause, actuated by impure and malicious motives, and founded on falsehood or misrepresention.—TAVENNER v. MOREHEAD, W. Va., 23 S. E. Rep. 673.

74. MANDAMUS — Exercise of Jurisdiction—Courts.—When a court refuses to exercise jurisdiction that it clearly possesses, *mandamus* is the proper remedy to compel its exercise.—STATE v. CALL, Fla., 18 South. Rep. 771.

75. MASTER AND SERVANT — Fellow-servants — Inspector of Machinery.—A person employed by a railroad company to inspect its locomotive boilers, and cause repairs to be made when necessary, is not a fellow-servant of other employees about the yards of the company; and, if they are injured by an explosion which might have been prevented by due care on his part, the company is liable.—TEXAS & P. RY. CO. v. THOMPSON, U. S. C. C. OF APP., 70 Fed. Rep. 944.

76. MASTER AND SERVANT—Railroad Companies—Fellow-servants.—Both the conductor and engineer of a train are the superiors of a brakeman on the same train, within the meaning of Comp. St. 1887, p. 817, § 697, providing that "the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."—CRISWELL v. MONTANA CENT. RY. CO., Mont., 42 Pac. Rep. 767.

77. MECHANIC'S LIEN — Liability of Contractor — Assumption by Owner.—In an action by a material-man against a contractor for lumber furnished for a house, it is no defense that the owner assumed the debt, unless there was a novation which released defendant.—ALDRITT v. PANTON, Mont., 42 Pac. Rep. 767.

78. MECHANICS' LIENS—Notice of Lien.—A notice of lien for labor and material furnished on three buildings, reciting that the buildings were all situated on the same lot, giving their relative positions on such lot, and stating the amount claimed on account of each, sufficiently shows a claim of lien on the entire lot and the buildings for labor and materials furnished on all the buildings.—SULLIVAN v. TREEN, Wash., 43 Pac. Rep. 38.

79. MORTGAGES — Redemption.—Under Code Proc. § 519, providing that the purchaser, from day of sale until redemption, shall be entitled to the possession of the property, and that, in case it is in the hands of a tenant holding under an unexpired lease, he shall be entitled to receive the rents or the value of the use and occupation during such period, a purchaser cannot, on redemption, be made to account for the rents and profits received by him from the time of sale to the redemption.—KNIPE v. AUSTIN, Wash., 43 Pac. Rep. 25.

80. MUNICIPAL CORPORATION—Execution.—An acre of land owned by a city, not shown to have been used for municipal purposes, and separated by a railroad from a tract which was so used, is subject to sale under execution against the city.—MURPHREE v. CITY OF MOBILE, Ala., 18 South. Rep. 740.

81. MUNICIPAL CORPORATIONS — Jurisdiction over Highways.—A city incorporated under Ann. Code, 1892, ch. 93, which provides, by section 2939, that each municipality shall constitute a "separate road district," and for the working of streets, and, by section 2945 *et seq.*, that the municipality shall have power to vacate and lay out streets, and makes the street commissioner road overseer, with general control over the streets, has exclusive jurisdiction, as against the county, over highways included within the corporate limits, and may order the same to be closed.—BLOCKER v. STATE, Miss., 18 South. Rep. 388.

82. MUNICIPAL CORPORATION — Ordinance Fixing Water Rates.—An ordinance requiring a water company to furnish water to citizens for domestic purposes at rates which should not exceed the average rates paid in other cities of similar size, and fixing a present basis of rates at six dollars a year for a building of five rooms and less, and one dollar a year for each additional room, other rates to be proportionate to those, —whether the occupants of the building consist of one, or more than one, family, and whether one or more faucets are used,—is not, as a matter of law, unreasonable.—CROSBY v. CITY COUNCIL OF MONTGOMERY, Ala., 18 South. Rep. 723.

83. MUNICIPAL CORPORATION—Public Improvements.—A city authorized only to grade streets at the cost of the land fronting on the street improved cannot contract for the grading of a street, the cost to be paid from the general funds of the city.—FINDLEY v. HULL, Wash., 43 Pac. Rep. 28.

84. MUNICIPAL CORPORATIONS — Public Improvement —Collateral Attack.—Under section 13 of the statute providing that if, at or before the time fixed for hearing objections to street improvements, objections be

not filed by the owners of one-half of the front feet abutting on the portion of the street to be improved, the city council "shall be deemed to have acquired jurisdiction" to order the improvement, the decision of the council that such objections were not filed may be attacked in an action to enjoin the collection of assessments levied therefor.—ARMSTRONG v. OGDEN CITY, Utah, 43 Pac. Rep. 119.

85. MUNICIPAL CORPORATION—Water Companies—Insufficient Supply.—Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract, has no right of action against the company.—BUAH v. ARTESIAN HOT & COLD WATER CO., Idaho, 43 Pac. Rep. 69.

86. NEGOTIABLE INSTRUMENTS—Defenses—Bona Fide Purchaser.—Where a party makes his negotiable promissory note, and intrusts it to the payee named therein, for the express purpose of being negotiated and discounted, and the proceeds applied by the payee, as his agent, to the purchase of United States bonds to be used in organizing a national bank, in which the maker of the note was to be interested as a stockholder, and the payee named in such note negotiates and indorses the same before maturity to a *bona fide* purchaser for value, who had notice of the purpose and object of the note, the subsequent misappropriation to his own uses by the payee of the funds received by him on the sale of such note, to which misappropriation the indorsee is in no wise a party, cannot be used as a defense by the maker of such note to a suit thereon by such innocent indorsee.—ARNAU v. FIRST NAT. BANK OF FLORIDA, Fla., 18 South. Rep. 786.

87. NEGOTIABLE INSTRUMENT—Promissory Notes—Indorsement.—Indorsement of a note by the payee, made after delivery thereof by him to a third person, in pursuance to a prior arrangement, is binding.—BROWN v. WILSON, S. Car., 23 S. E. Rep. 630.

88. NON-NEGOTIABLE INSTRUMENTS — Assignment.—Where a party assigns a non-negotiable instrument calling for the payment of money by writing his name across the back and delivering it, he warrants by implication, unless otherwise agreed, its validity, and his right to assign, that it is a subsisting unpaid debt, and the solvency of the debtor.—MERCHANTS' NAT. BANK OF WEST VIRGINIA v. SPATES, W. Va., 23 S. E. Rep. 681.

89. OFFICERS—Refusal to Obey Statutes—Mandamus.—Executive officers of the State government, have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the constitution.—STATE v. HEARD, La., 18 South. Rep. 746.

90. PARTITION—Tenants in Common.—Where, in partition, it appears that the improvements placed on the lands by a tenant in common are equal to its rental value while he was in possession, he is entitled to recover such portion of the taxes on the land paid by him while in possession as inured to the other tenants in common.—LEAKE v. HAYES, Wash., 43 Pac. Rep. 48.

91. PARTNERSHIP.—As a general rule, the simple contract creditors of a partnership have no lien upon the partnership property until it is acquired by process of law, and a *bona fide* transfer of the partnership property, while it remains within the control and possession of the firm, made upon sufficient consideration, and with the consent of all the partners, places it beyond the reach of the partnership creditors.—MYERS v. TYSON, Kan., 43 Pac. Rep. 91.

92. PARTNERSHIP—Mortgage — Trover.—A mortgage by a partner individually of his undivided partnership interest in a cotton ginnery and toll cotton to be earned during a specified time confers on the mortgagee no right of possession to the specific property mortgaged so as to enable him to sue partnership vendees of such property in trover for its conversion or on the case for destroying his mortgage lien.—FIELDS v. BRICE, Ala., 18 South. Rep. 742.

93. PLEDGE—Bill of Lading—Title.—A party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft.—NEILL v. ROGERS BROS. PRODUCE CO., W. Va., 23 S. E. Rep. 702.

94. PROCESS—Service [of—Corporations.—An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper, and had authority to contract for the publication thereof at regular rates, the making of such contracts being a substantial part of the corporate business: Held, that the corporation impliedly assented to be found in New York, and service of summons might be made upon it there.—PALMER v. CHICAGO HERALD CO., U. S.C. C. (N. Y.), 70 Fed. Rep. 886.

95. PROCESS—Service—Privilege of Non-resident.—M, being a non-resident in attendance upon a term of the United States Circuit Court for the district of Idado as plaintiff in a suit brought by him against G, a resident of Idaho, was not exempt from service of a summons in an action commenced by G against him in the district court of Idaho.—GUYNN v. MCDANELD, Idaho, 43 Pac. Rep. 74.

96. PROHIBITION — Private Person.—After the court has sustained a demurrer to a complaint in a suit to restrain the enforcement of a judgment, a writ of prohibition will not issue to prevent the court from interfering with said judgment.—STATE v. SUPERIOR COURT OF KING COUNTY, Wash., 43 Pac. Rep. 43.

97. RAILROAD COMPANY — Fire—Proximate Cause.—One who negligently sets out a prairie fire, which causes the destruction of the property of another, is liable for the injuries sustained, when it is such as reasonably should have been foreseen as the natural and probable consequence of the negligent act.—UNION PAC. RY. CO. v. MCCOLLUM, Kan., 43 Pac. Rep. 97.

98. RAILROAD COMPANY—Negligence—Evidence—Custom.—Where an act of a brakeman in mounting a car was not *per se* negligent, it is competent to show that under the same circumstances experienced brakemen perform the same act as he did.—PROSSER v. MONTANA CENT. RY. CO., Mont., 43 Pac. Rep. 81.

99. REMOVAL OF CAUSES — Suits against Federal Officers.—An action for damages for false imprisonment, based upon acts done by the defendants as marshal and deputy marshal of the United States, in execution of process of a federal court, is, without regard to the citizenship of the parties, within the jurisdiction of the federal courts, and may be removed thither from a State court, although the complaint is so framed as to conceal the fact the defendants were acting as federal officers if that fact must necessarily be shown by the plaintiff upon the trial and is disclosed by the petition for removal.—WOOD v. DRAKE, U. S. C. C. (Wash.), 70 Fed. Rep. 881.

100. SALE—Action—Damages.—Where a party sells a horse to another upon the condition that it is to remain the property of the vendor until paid for, and such horse is wrongfully killed by a railroad train while in the possession of such vendee, either the vendor or conditional vendee can sue for and recover damages for such tort, but a recovery by either will be a bar to any further recovery by the other.—SMITH v. GUFFORD, Fla., 18 South. Rep. 717.

101. SALE—Delivery of Possession—Retention of Interest.—An absolute present sale of chattels is valid between the parties without delivery of possession or payment of the price; and the seller is entitled to the price, the purchaser to the possession of the chattels. But as to subsequent purchasers without notice from the seller, or his creditors, the non-delivery of possession renders the sale *prima facie* void, as a matter of

law, calling on the purchaser to show clearly the sale to be *bona fide;* but, if shown to be so, it is valid against such purchasers and creditors.—POLING v. FLANAGAN, W. Va., 23 S. E. Rep. 685.

102. SALE—Conditional Sale.—Where, in an action for the price of goods, the evidence shows that the goods were to be paid for on certain conditions, it must be shown that the conditions have been fulfilled. —HOLT LIVE STOCK CO. v. WATKINS, Colo., 43 Pac. Rep. 121.

103. SALE—Vesting of Title—Delivery.—In a contract of sale of personal property, the intent of the parties controls, and if they intended a present vesting of title, the title may in fact pass at once to the purchaser, although the actual delivery thereof is to be made subsequently, and whenever a dispute arises as to the true character of an agreement, the question of intent is rather one of fact than of law; and the finding of the trial court, when sustained by the evidence upon this question, will not be disturbed upon review.—KNEELAND v. RENNER, Kan., 43 Pac. Rep. 95.

104. SALE—Warranty—Parol Evidence.—Evidence of verbal statements and representations made during the negotiations for the sale of a horse is not admissible to contradict or enlarge a written warranty delivered at the time the sale is consummated, unless it is first shown that, through fraud or mistake, material parts of the warranty were omitted from the writing. —HUSTON v. PETERSON, Kan., 43 Pac. Rep. 101.

105. SCHOOL DISTRICTS—Officers—Authority.—The officers of a school district cannot by contract create a district liability for the building of a school house, unless they were first legally authorized so to do, on a site selected, and out of the funds provided for that purpose, by the electors of the district.—SCHOOL DIST. NO. 80 v. BROWN, Kan., 43 Pac. Rep. 102.

106. SPECIFIC PERFORMANCE.—An action for specific performance, and also to have certain conveyances set aside, and for partition of lands, and, if specific performance cannot be decreed, to have the moneys advanced by plaintiff declared a lien, is local, and not transitory.—STATE v. SUPERIOR COURT OF SNOHOMISH COUNTY, Wash., 43 Pac. Rep. 19.

107. SUBROGATION—Mortgages.—Where a person contracts with the maker of a note to pay the same, on payment thereof by the maker he is not entitled to be subrogated to the rights of the payee, and therefore can only recover the amount paid by him, with legal interest, instead of the rate of interest provided for in the note.—HALBERT v. PADDLEFORD, Tex., 33 S. W. Rep. 592.

108. TAXATION—Bank.—When the Citizen's Bank subjects property to its ownership, which was mortgaged to secure stock subscriptions, the property is not exempt from taxation as part of the capital of the bank. —STATE v. BOARD OF ASSESSORS, La., 18 South. Rep. 753.

109. TRADE-NAME—Injunction.—A corporation which, with arrangement with one R W R, takes his name and stamps it upon articles sold by it, with the purpose of inducing the public to think that in purchasing such articles they are purchasing the product of another "R" company of established reputation, will be restrained from using such stamp.—R. W. ROGERS CO. v. WM. ROGERS MANUF'G CO., U. S. C. C. of App., 70 Fed. Rep. 1017.

110. TRADE-NAME—Injunction. — The mere fact that one knows that cheap goods sold by him to the trade, stamped with his name, can and will be sold by dishonest dealers under representations that they are manufactured by a company of established reputation having a similar name, which manufactures a high class of goods, does not justify an injunction against the use of such stamp.—ROGERS v. WM. ROGERS MANUF'G CO., U. S. C. C. of App., 70 Fed. Rep. 1019.

111. TRESPASS — Exemplary Damages. — Exemplary damages cannot be recovered for a trespass unless it was committed maliciously, wantonly, or with circumstances of aggravation.—GARRETT v. SEWELL, Ala., 18 South. Rep. 737.

112. TRUST—Implied Trust.—When trust funds are invested in land by a trustee, and the title is taken in his own name, an implied trust will be raised in favor of the *cestui qui trust*. If such funds are paid in pursuance of the contract of purchase, it does not matter whether they were paid before, at the time of, or after the purchase.—WEBB v. BAILEY, W. Va., 23 S. E. Rep. 644.

113. VENDOR AND PURCHASER.—Where a vendee of land assumes the payment of a mortgage thereon securing notes of the grantor to a corporation, in an action by the corporation against the vendee on the notes, his privity with the grantor, who is estopped from denying the corporation's right to sue, and his payment of interest on the notes, render the admission in evidence of insufficient articles of incorporation harmless error.—STUYVESANT v. WESTERN MORTGAGE & INVESTMENT CO., Colo., 43 Pac. Rep. 144.

114. VENDOR AND PURCHASER — Sale of Land—Construction.—A contract for sale by defendant of a tract divided into lots provided for part payment in cash, and the balance in installments, secured by a vendor's lien. Plaintiff had an option to sell any of the lots, and in such case defendant was to join in a deed to the purchaser, on receiving from him at least one-third in cash, with notes for balance, secured by trust deed; payments and notes so received to be credited on plaintiff's notes. Plaintiff was not to sell any lots below a stated sum, but no maximum price was fixed: Held, that defendant was not liable for his refusal to convey to a purchaser procured by plaintiff, and to apply the price offered on plaintiff's notes, where such purchaser was to take a few of the lots at so high a price that plaintiff's notes for the price of all the lots would be canceled by the cash payment of one-third and the purchase notes, and that such cash payment was to be advanced by plaintiff.—WOLFF v. HELBIG, Colo., 43 Pac. Rep. 133.

115. VENLOR AND PURCHASER—Vendor's Lien.—Where a vendor's lien is expressly retained, the duty rests on the vendor, if owner of the lien at the time, to execute at his expense a release, on payment of the purchase price.—ENGELBACH v. SIMPSON, Tex., 33 S. W. Rep. 896.

116. WATERS—Dam—Overflow—Damages.—One who erects a dam which caused the overflow of land is liable to the owner thereof for stock killed and injured by getting into mud left on the land on the receding of the water, and such reasonable expenses incurred in treating animals injured thereby.—HUGHES v. CITY OF AUSTIN, Tex., 33 S. W. Rep. 607.

117. WATERS—Riparian Owners—Accretions.—Where two irregular pieces of ground lie upon the north side of the Kansas river, at a point where the course of the river is southeast, and are separated from each other by a half quarter-section line, running north and south, the accretions formed by the recession of the river to the south belong to the respective tracts of land lying immediately north thereof, and the division line between the two tracts continues to be the half quarter-section line extended.—MCCAMAN v. STAGG, Kan., 43 Pac. Rep. 86.

118. WATER-COURSE—Damages—Limitations.—Where, in an action for injury to land from a dam built by a railroad, it appears that the injury is permanent, the damages must be computed on the value of the land when the dam was built, and not at the time of the trial.—MISSOURI, K. & T. RY. CO. OF TEXAS v. GRAHAM, Tex., 33 S. W. Rep. 576.

119. WITNESS—Credibility—Jury.—The credibility of a witness or witnesses is a question peculiarly within the province of the jury, and when this is the sole question presented on writ of error to the judgment of the circuit court overruling a motion to set aside the verdict of the jury for this cause alone, this court will not disturb such judgment.—AKERS v. DE WITT, W. Va., 23 S. E. Rep. 669.